

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

NORTHERN DIVISION

CR. 12-10047-01

UNITED STATES OF AMERICA,

Plaintiff,

-VS-

VOLUME I of III

JULY 30, 2013

MARIO M. CONTRERAS,

Defendant.

10

11 U.S. District Courthouse
12 Sioux Falls, SD
July 30, 2013
8:30 a.m.

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JURY TRIAL
(VOLUME I of III)

15

BEFORE: The Honorable Lawrence L. Piersol, and a Jury
U.S. District Court Judge
Sioux Falls, SD

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21

-and-

22

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for the Plaintiff

25

1 APPEARANCES: (Continued)

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7 for the Defendant

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13 ALSO PRESENT: Defendant Mario M. Contreras

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25 COURT REPORTER:

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1 * * * * * JULY 30, 2013 * * * * *

2 (In open Court, counsel and Defendant present,
3 at 8:39 a.m.)

4 PRETRIAL MOTIONS

5 THE COURT: Good morning. Appearances, please.

6 MR. WRIGHT: Your Honor, Jay Miller and Tom
7 Wright for the Plaintiff, USA.

8 MR. KHOROOSI: Good morning, Your Honor. Sam
9 Khoroosi appearing with the Defendant, Mario Contreras.

10 THE COURT: Who is the young lady behind you?

11 MR. KHOROOSI: This is my assistant, Heather
12 Gray.

13 THE COURT: All right. I'll deal with what was
14 filed most recently, in light of the Court's ruling
15 yesterday that the Count 4 would be severed.

16 The Government at that point then gave oral notice of
17 404(b) evidence, and then followed that up yesterday
18 afternoon yet with a written notice. It deals with the
19 August 2011 incident where the Government claims it has a
20 red mark on the alleged victim's bottom, which the
21 Defendant apologized and admitted to to her mother.

22 Well, I assume that this would be for purposes of
23 showing no accident. Is that correct?

24 MR. WRIGHT: That is correct, Your Honor. If I
25 may address something else.

1 THE COURT: You may.

2 MR. WRIGHT: Mr. Miller and I have kind of
3 divided up, with the Court's kind permission, Mr. Miller
4 was going to divide up the motions in limine. I was going
5 to address the Government's motions in limine and the
6 Rule 404(b) material. Mr. Miller was going to --

7 THE COURT: Frankly, I'm just going to rule on a
8 lot of them. We are short on time today, because the Court
9 scheduled this for 3:00 yesterday, and, of course as you
10 know, we couldn't proceed. That's why I had more time for
11 this yesterday.

12 So the way I see it on this 404(b) is that if the
13 defense puts in evidence of accident, then it would be a
14 question as to whether this 404(b) would come in, because
15 it would be rebuttal.

16 But I don't know what your proof is, because some of
17 the papers indicated that the picture that was taken was
18 overexposed. Is that correct?

19 MR. WRIGHT: Yes, sir.

20 THE COURT: So what's your evidence?

21 MR. WRIGHT: It will be the testimony of the
22 victim's mother and the testimony of the victim's
23 grandmother that saw the handprint on the child's butt. To
24 answer the Court's earlier question, it would go to rebut
25 that --

1 THE COURT: That what?

2 MR. WRIGHT: As you said earlier, lack of mistake
3 or accident. That would be the exception that we would
4 offer it.

5 THE COURT: All right. What would be the nature
6 and extent of the injury as they would testify to it?

7 MR. WRIGHT: That they saw a handprint on the
8 child's butt that was serious enough for them to consider
9 going to the doctor, serious enough for them to call the
10 Defendant and ask him what was going on, and the Defendant,
11 we anticipate the victim's mother and grandmother will
12 testify the Defendant apologized and admitted that he had
13 struck the child and left the handprints on the buttocks.

14 THE COURT: How long is this after, that they saw
15 it, after the striking had occurred, if you know?

16 MR. WRIGHT: How long did they notice the
17 handprint?

18 THE COURT: How long was it between when the
19 striking took place and they saw the handprint?

20 MR. WRIGHT: Just a few hours. He had the child
21 for the weekend. The child came back, and they were
22 changing the child's diaper. I think it was just a matter
23 of hours after the Defendant had hit the child with his
24 hand.

25 THE COURT: Well, was the handprint raised, or

1 was it only the imprint of a hand and no welt or anything?

2 What was the situation?

3 MR. WRIGHT: They could probably testify to that
4 better than me. They basically said they saw a print of a
5 hand on the child's buttocks consistent with being spanked
6 too hard.

7 The other thing, Your Honor, Aleeyah was a Native
8 American child, and, of course, would have darker skin than
9 a Caucasian. It would take a lot of force to leave a
10 handprint on a child like that. We would ask the Court to
11 consider admitting that testimony.

12 THE COURT: Well, if accident is claimed, and
13 it's this Court's understanding it will be, it is relevant
14 to a material issue. It is similar in kind and not overly
15 remote in time to the crime charged. It's about five
16 months apart.

17 The reason I was asking the other question is whether
18 it is supported by sufficient evidence.

19 Finally, the question is whether it's higher in
20 probative value than prejudicial effect. I'll ask the
21 defense if you have comments upon those things.

22 MR. KHOROOSI: Your Honor, even assuming that
23 everything that Miss Cook and her mother will testify to is
24 correct and true, it's far more prejudicial than probative.
25 It has very little probative value to the issue of what and

1 whether Mr. Contreras did anything on January 9 to affect
2 the death of this child. It was in a completely different
3 area of the body. There's no evidence that the mark was
4 raised, that it made any permanent damage. There is also
5 evidence that the child had a Mongolian spot, a birthmark.

6 THE COURT: How big?

7 MR. KHOROOSI: I believe that's contained in
8 Dr. Froloff's report. I don't know off the top of my head.

9 But the testimony, even if true, and I highly question
10 its credibility. But even if it is true, it's simply too
11 remote in time. I respectfully submit that five months
12 prior to this precipitating injury is far too remote to
13 consider the lack of accident on January 9, 2012.

14 THE COURT: If you are going to beat a child
15 because of loss of temper or something, and you're an adult
16 and you're the person charged, in part, with the care of
17 that child, five months is not particularly remote in the
18 Court's view, so I don't buy that one.

19 MR. KHOROOSI: Well, at any rate, Your Honor, it
20 is more prejudicial than probative.

21 THE COURT: First of all, of course, nobody is
22 going to be able to talk about that in opening statement,
23 because if it comes in at all, it will come in as rebuttal
24 evidence, once accident is put in issue.

25 The rest of it is that I'm going to have a hearing out

1 of the presence of the jury, so that the proffered
2 testimony is heard by me, so that I can see that it's
3 supported by sufficient evidence, and that the nature and
4 extent of it is such that it should come in. I mean
5 because sometimes kids get spanked on the butt,
6 and it might show for a time. This might be something
7 completely different than that, where it was totally not
8 only wrong, but totally inappropriate and possibly a crime.

9 But I want to hear the nature and extent of it before
10 it comes before the jury. Do we have any questions about
11 that?

12 MR. WRIGHT: No, sir.

13 MR. KHOROOSI: No, Your Honor.

14 THE COURT: Then on the Government's motions in
15 limine, Document 31, there was a request for an order in
16 limine precluding the attorney for the Defendant or any
17 witness to refrain from referencing directly or indirectly
18 to penalty or punishment. That's granted.

19 There was a request for an order in limine precluding
20 the Defendant, the attorney for the Defendant, or any
21 witness to refrain from making any comments or references,
22 whether direct or indirect, to express their opinion on the
23 Defendant's guilt or innocence.

24 That's granted in part and denied in part. It's
25 denied to the extent that the Defendant, if he chooses to

1 testify as to his innocence, can proclaim his innocence.
2 Other witnesses, though, can't give an opinion, either
3 directly or indirectly, with regard to whether the
4 Defendant is guilty or not. That's for the jury to decide.

5 Also, of course, counsel can make appropriate closing
6 argument based upon the claim of the Defendant, but counsel
7 for the Defendant, nor counsel for the Government, for that
8 matter, cannot vouch with regard to guilt or innocence in
9 their own opinion.

10 Then, third, there was a request for an order in
11 limine prohibiting any reference to the fact the Defendant
12 was released on bond pending trial in the case or as to
13 what he's been doing since arrest. That's granted, except
14 the Defendant is allowed, of course, if he testifies, to
15 give background information, including employment that he's
16 been involved in.

17 Then No. 4, there was a request for an order in limine
18 prohibiting the Defendant from introducing his own
19 statements through other witnesses. That is granted,
20 because that would be inadmissible hearsay.

21 MR. KHOROOSI: If I could make a record on that,
22 please.

23 THE COURT: Yes.

24 MR. KHOROOSI: As I don't need to remind the
25 Court, a lot of evidence that would be classified as

1 hearsay is admissible under the rules of evidence. I'm
2 thinking specifically about an excited utterance or
3 something to that effect. As long as the rules of evidence
4 permit, I would ask the Court deny that motion.

5 I don't intend to introduce inadmissible hearsay, and
6 I wouldn't ask for permission to do so. I would ask that
7 the Court allow those types of statements into the record.

8 THE COURT: The Court is pretty well aware of the
9 exceptions to the hearsay rule. As each instance arises in
10 which something is either hearsay or not and an objection
11 is made, I'll rule on it. I'm aware there are exceptions
12 to the hearsay rule, but that isn't one of them. So that's
13 granted.

14 There was a -- so we don't have any question about
15 that, Defendant's statements that come in through other
16 witnesses is hearsay and not subject to a hearsay
17 exception. That motion is granted.

18 Then there's a request to use a blackboard during
19 opening statement. That's granted.

20 No. 6 was a request that Agent Rob Mertz of the FBI be
21 allowed to sit at counsel table during the trial. Is that
22 something you are still asking for or not?

23 MR. WRIGHT: Actually what we're asking for, with
24 the Court's permission, would he be allowed to sit right
25 behind us in the Courtroom, where Mr. Khoroosi's assistant

1 is, maybe behind us in the well of the courtroom?

2 THE COURT: Well, is he going to testify?

3 MR. WRIGHT: We anticipate him giving testimony
4 in our case in chief.

5 THE COURT: Is he the primary case agent or not?

6 MR. WRIGHT: He is, Your Honor. He is the only
7 case agent.

8 THE COURT: That's granted. That's within the
9 Court's discretion.

10 Then there was a request for sequestration from both
11 sides. That's granted as to both sides.

12 Is there any request that an expert be able to be
13 present to hear any testimony?

14 MR. KHOROOSI: I was just going to make that
15 request, Your Honor, yes. I would ask that be reciprocal,
16 as well.

17 MR. WRIGHT: No objection to their motion.

18 THE COURT: What about, is the Government going
19 to have experts? Do you want to have experts sit in to
20 hear testimony?

21 MR. WRIGHT: Yes, we do, Your Honor.

22 THE COURT: That is reciprocal then. Each side,
23 the exception to the sequestration is each side can have
24 their expert or experts present to listen to testimony,
25 both before the expert testifies as well as after, because

1 it's possible that an expert would be called in rebuttal
2 again. They can sit throughout the trial, experts can
3 only.

4 Then No. 8 was a request for an order in limine
5 prohibiting any reference or question or regarding any
6 prior arrest, conviction, or police report regarding the
7 child's mother or her husband. The Government contends
8 that the only issue in this case is what caused the child's
9 injuries, which the experts agree occurred within the 24
10 hours of being brought to the hospital when the child was
11 in the Defendant's custody.

12 Now, it's been indicated already that the child's
13 mother is going to testify. I don't know if there's any
14 conviction that might be used with regard to her
15 credibility if she does testify. I don't know if there is.
16 Is that an issue or not?

17 MR. WRIGHT: It's my understanding, Your Honor,
18 the child's mother has no prior felony convictions, and she
19 has no convictions involving dishonesty. She has a DWI
20 arrest, a couple other alcohol-related offenses, disorderly
21 conduct, but there's no convictions involving dishonesty or
22 felony convictions.

23 We received a packet of the information from the
24 defense regarding proposed exhibits that deal with minor
25 tribal things like that that they seek to introduce.

1 That's exactly what this motion seeks to preclude on any of
2 the witnesses, any reference to any prior arrest, any time
3 they spent in jail, unless it's a conviction that meets the
4 test of Rule 608 and 609.

5 Your Honor, the Defendant himself has been in jail
6 five different times. We aren't going into any of the
7 other convictions of the Defendant. He has some DWIs. He
8 has some other things. We aren't going into any of that
9 stuff. We ask it be reciprocal for our witness unless the
10 Court has found that it's a crime of dishonesty or prior
11 felony.

12 THE COURT: Mr. Khoroosi?

13 MR. KHOROOSI: I think it's appropriate for
14 impeachment, even if a prior bad act doesn't result in a
15 conviction or conviction of a felony. If Miss Sine gets up
16 there and testifies to one thing, and we have evidence to
17 prove otherwise, that's fair game for cross-examination.

18 THE COURT: That's different than showing a prior
19 conviction as deals with credibility. If she says, "I
20 never did X," and X is some part of her testimony, and
21 you've got some proof that she did X, but that isn't a DWI.
22 I mean if, for instance, she said, "When I saw the baby's
23 mark on her butt, for instance, I wasn't drunk," and you
24 have a public intoxication for that exact time, that would
25 be different. That would be impeaching her testimony by

1 showing at that time she was drunk and impaired her ability
2 to comprehend. That wouldn't be admissible with regard to
3 her general credibility. So what do you have?

4 MR. KHOROOSI: Your Honor, that's precisely how
5 we intend to use it. I don't know that we have an
6 objection as the Court is interpreting the motion. I think
7 the language is a little bit broad. Mr. Sine, if he
8 testifies, he'll be quite impeachable. I think it's
9 relevant prior bad act evidence to show that he was
10 convicted of child neglect shortly after this child died.

11 These matters are relevant. The evidence I believe
12 will show that the mother and her husband both have
13 extensive drinking problems, domestic violence problems.
14 They've got that kind of reputation in the community. We
15 would ask we not be precluded from introducing that
16 evidence. Now, evidence of --

17 THE COURT: Don't get off of that. Let's talk
18 about that point. I didn't see any authority -- I haven't
19 seen any authority that would support putting that in.
20 Prior bad acts, the law is pretty well developed as to what
21 you can put in as prior bad acts. From what I'm hearing so
22 far, a DWI, that isn't going to come in. There's a
23 conviction for child neglect, you say?

24 MR. KHOROOSI: Yes, Your Honor.

25 THE COURT: Where is the conviction?

1 MR. KHOROOSI: In Tribal Court, Your Honor.

2 THE COURT: Was it a finding of neglect and
3 removal of child, or was it a criminal conviction?

4 MR. KHOROOSI: It was a criminal conviction.

5 THE COURT: What was the sentence?

6 MR. KHOROOSI: I don't recall what the sentence
7 was, Your Honor, but the charge was, I believe specifically
8 was being intoxicated without any sober supervision for the
9 children.

10 THE COURT: That's not going to come in, because
11 that isn't something that gets to be admitted with regard
12 to her credibility, this mother's credibility, and there's
13 no claim she's the one who was even present when this child
14 sustained its injuries.

15 MR. KHOROOSI: Not specifically to credibility,
16 Your Honor, but it's a central component to our defense
17 that these injuries could have happened on mom's watch,
18 that mom's house was not safe.

19 THE COURT: I'll have to hear the evidence that
20 develops on that. Before any of that business with regard
21 to a child abuse conviction in Tribal Court is suggested,
22 we'll have a hearing out of the presence of the jury.
23 That's not something you can use in opening statement.

24 MR. KHOROOSI: We won't, Your Honor.

25 THE COURT: All right. There is a Document

1 No. 59 that talks about character evidence of the victim's
2 mother. The Government moves the Court for an order in
3 limine prohibiting the Defendant or his counsel or any
4 witness from referencing the character of the victim's
5 mother, Shannon Marie Sine. Am I pronouncing that
6 correctly?

7 MR. WRIGHT: Yes, sir. May I be heard on that
8 motion, Your Honor?

9 THE COURT: I haven't finished saying what the
10 motion is yet.

11 MR. WRIGHT: It's the same as the one you just
12 ruled on. We apologize that we filed a duplicate motion.
13 The motion you just covered, No. 8 of the original motions
14 that we just filed, I was on medical leave for four weeks,
15 and Mr. Maher filed this motion, not seeing my other
16 motion. So it's duplicative to the one you just ruled on.
17 We apologize. It's duplicative of Motion No. 8 in
18 Document 31, which you just asked us about.

19 THE COURT: Are you saying 59 and 31 are
20 duplicative?

21 MR. WRIGHT: No. I'm saying that 59 and Motion
22 No. 8 under 31 are duplicative.

23 THE COURT: That's what I was trying to say.

24 MR. WRIGHT: Yes. So the last motion in 31.

25 THE COURT: So we're on the same page. Document

1 No. 31, Motion 8 contained in Document 31 is essentially
2 the same as Document No. 59.

3 MR. WRIGHT: Yes, sir.

4 THE COURT: Got it. All right. Then we have
5 Document No. 61, which is the Government moves the Court
6 for an order in limine prohibiting the Defendant from
7 presenting the following opinion of Dr. Brad Randall, which
8 is contained on Page 4 of Dr. Randall's April 4, 2013,
9 letter opinion.

10 The opinion in question is the following: "During the
11 course of my career as a forensic pathologist, nearly 36
12 years, I have found that biologic parents are far less
13 likely to inflict abusive head trauma to children than
14 other caregivers. It has also been my observation that
15 those inflicting abusive head trauma to children rarely do
16 so when other reliable witnesses are present within earshot
17 in the same dwelling."

18 So it's really a separate opinion in each of those two
19 sentences. I'll hear from the Government on that, and then
20 I'll hear from the defense.

21 MR. WRIGHT: Well, the motion is we're seeking to
22 preclude Dr. Randall from saying that "I've handled a lot
23 of these cases and I've handled a very few cases where a
24 biological father has actually done this to his child."
25 Has handled very few cases or reviewed very few cases where

1 someone has inflicted an injury on a child when other
2 people are in the house there, in the room.

3 The fact that Dr. Randall hasn't had very many cases
4 like that I don't think is a proper basis for opinion
5 testimony that it does not exist. I could call a number of
6 witnesses. This Court has had a number of cases where
7 biological fathers have sexually assaulted or possibly
8 killed their own children. It doesn't mean those cases
9 haven't existed.

10 The fact that Dr. Randall hasn't had any or had very
11 few we don't think makes it proper for expert opinion that
12 it doesn't happen. So we would ask the Court to preclude
13 that kind of testimony.

14 THE COURT: Mr. Khoroosi?

15 MR. KHOROOSI: I think it is relevant.
16 Dr. Randall is not going to testify that it's impossible
17 for a biological father to kill a child. That's absolutely
18 not what he's suggesting. He's competent to render that
19 opinion.

20 Moreover, the recent witness disclosed by the
21 Government, Dr. Snell, agrees with that opinion. He goes
22 one step further. He says that biological parents are
23 unlikely or less likely. Not just that it's not common in
24 his experience. It's his expert testimony it's unlikely,
25 though possible. That's exactly what Dr. Randall's

1 testimony is.

2 THE COURT: It isn't a question of probabilities
3 here. It's a question of under the facts of this case, did
4 this father or didn't he do what is alleged? The fact that
5 a biological father is more or less likely, depending on
6 what an expert says, to do this isn't probative. The
7 testimony isn't going to be allowed, either from the
8 Government's witness or from the defense witness, that
9 actually deals with the first sentence.

10 The second one is, "It has also been my observation
11 that those inflicting abusive head trauma to children
12 rarely do so when other reliable witnesses are present
13 within earshot in the same dwelling." That's really him
14 giving an opinion as to guilt or innocence. That's him
15 commenting upon the evidence in a way that isn't
16 particularly within his expertise, as I see it.

17 That's probably a common sense argument, and one that
18 can be made by the defense in argument. But it's strictly
19 that. That isn't something that's subject to expert
20 opinion, and I don't think it's helpful to the jury. Not
21 only that, we don't know the basis for his saying that.

22 I realize Dr. Randall was the coroner here in
23 Minnehaha County for many years. I don't know how many of
24 these cases he's had, but we don't have any of that neither
25 to support his opinion, even if the opinion were relevant,

1 and the opinion makes common sense in both instances in
2 both sentences. But it isn't properly the subject of
3 expert opinion that's relevant to the issues in this case.
4 That motion is granted.

5 Then there's the Jerard Hoeger e-mail, Document
6 No. 72. I made a note to myself to look at that e-mail,
7 but I haven't seen it because I forgot to look. Who has
8 it?

9 MR. WRIGHT: May I approach?

10 THE COURT: Yes, hand it to the clerk.

11 (Court reviewing Document 72)

12 THE COURT: Maybe this e-mail is moot. Was the
13 defense hoping to use it for something?

14 MR. KHOROOSI: We don't intend to use the e-mail
15 for anything. No.

16 THE COURT: So it's moot. This e-mail, which is
17 from an FBI agent to Mr. Wright, won't come into evidence.
18 So that motion, Document 72, is granted as it's moot. Give
19 this back to Mr. Wright.

20 Then the Defendant's motions in limine, I have already
21 ruled on the Defendant's motion to bifurcate by severing
22 Count 4, which the Court granted.

23 With regard to Document 63, which is the Defendant's
24 motions in limine, the Defendant moved to exclude reference
25 to any prior criminal history under Rules 401 and 402, and

1 Defendant further requests, if he elects to testify,
2 reference should be excluded, notwithstanding Rule 609(a),
3 on the 403 grounds that any probative or impeachment value
4 is outweighed by the unfair prejudice that would result
5 from the admission.

6 Well, in its response, the Government asserts it does
7 not plan on impeaching the Defendant with certified copies
8 of any prior convictions if he does choose to testify. The
9 Government does not plan on eliciting testimony about any
10 arrests, other than if the Defendant's arrest regarding
11 this matter should somehow become relevant. That motion in
12 limine is granted as moot.

20 The response from the Government is that, as I take
21 it, rather than A through F, what the Government hopes to
22 put in is the incident with regard to the mark on the
23 bottom that the Defendant admitted to five months before.
24 Is that correct?

25 MR. MILLER: That is correct.

1 THE COURT: I've already ruled on that one as to
2 what I want to see out of the presence of the jury if that
3 becomes relevant. The rest of those in A through F are not
4 going to be presented in evidence. So the Court doesn't
5 have to rule on them. That's moot.

6 Then on Document 79, that's what I call the cracking
7 on the head, that's not going to be offered into evidence.
8 Is that correct?

9 MR. MILLER: Your Honor, if I may correct myself.
10 Paragraph F deals with the events of January 9, which is
11 the date in the Indictment. That's the res gestae of our
12 case.

13 THE COURT: Okay. That's the incident in
14 question.

15 MR. MILLER: That's correct.

16 THE COURT: Oh, yes, I understand that.

17 MR. MILLER: The other issue is the 404(b)
18 related to the crack on the head, which is a separate
19 404(b) motion than what we've talked about.

20 THE COURT: Well, I want to hear from each side
21 on that. I read the Grand Jury testimony of that witness
22 who, when Grand Jury testimony was given, was either 14 or
23 16, I don't remember which age.

24 With regard to I call it the crack on the head, let me
25 hear from the defense on that one because it's your motion.

1 MR. KHOROOSI: Your Honor, any probative value is
2 outweighed by the prejudicial effect. This case is about
3 whether Mr. Contreras did anything to his younger daughter,
4 A.C., and not this 14-year-old boy that testified at the
5 Grand Jury. I think it's completely inappropriate to allow
6 it in in this trial. It serves only to prejudice the jury.
7 It doesn't establish MO. It doesn't establish intent. It
8 doesn't establish anything with regard to this two-year-old
9 girl.

10 I think its prejudicial effect will be instantaneous
11 and severe. The jury will automatically assume that
12 because he did this to his 14-year-old son, that he's going
13 to use the same discipline method, even if it's true as to
14 his 14-year-old son, it doesn't prove anything regarding
15 how he treats his two-year-old daughter.

16 THE COURT: All right. Let me hear from the
17 Government on that.

18 MR. WRIGHT: It's critical evidence to our case.
19 The evidence we believe will show the Defendant cracked or
20 hit this 14-year-old witness a number of times on the head
21 and also slapped him across the face.

22 THE COURT: I didn't get the slapping across the
23 face from the Grand Jury testimony.

24 MR. WRIGHT: We actually never introduced any of
25 the 404(b) evidence in front of the Grand Jury. It's all

1 based upon the videos, I believe.

2 THE COURT: Oh, that's what it was I read.

3 MR. WRIGHT: The 404(b) evidence, we deliberately
4 did not present that to the Grand Jury, because we don't
5 think somebody should be indicted on 404(b) evidence. They
6 should just be indicted on the offense of the case. That's
7 why it wasn't in the Grand Jury testimony.

8 But the basis, what the witness is going to testify to
9 is that he lived with the Defendant for a long period of
10 time, and the Defendant would routinely lose his temper and
11 crack him on the head. In the video that I think the Court
12 watched, the witness even demonstrated with his fist that
13 the Defendant would hit him like this and also said during
14 the video that he got slapped on the face. This witness
15 lived with the Defendant. The Defendant routinely hit him.

16 Now, it's our understanding in this case the Defendant
17 is going to say the victim died from a fall. The medical
18 testimony, the experts will show this child was beaten to
19 death and sustained a number of blows to the head. In
20 fact, the Court has had a chance to review one of the
21 pictures. We anticipate there will be testimony that shows
22 one of the pictures is indicative of a fist to the brain.
23 There are actually four deep contusions that show in the
24 pictures.

25 So it's our allegation this man beat a two-year-old

1 child by punching her in the head repeatedly. There's
2 404(b) evidence that shows he punched another child, not
3 his biological child, but someone he is very close to and
4 lived with him for a long period of time, in the head,
5 which goes directly to their announced defense that this
6 other child died by accident. It's clearly relevant to
7 show lack of mistake or accident. It's recent in time. We
8 would ask the Court to receive it. Or if the Court is on
9 the fence about receiving it, we would at least like the
10 opportunity for that child to testify outside the presence
11 of the jury, so the Court can hear that first and then make
12 a determination. But it's critical testimony to our case.

13 MR. KHOROOSI: If I could be heard, Your Honor.
14 The prejudicial effect of evidence like that is precisely
15 why our motion to sever was made, or one of the main
16 reasons. This is evidence that is more properly -- if the
17 Government wants to charge it out, they can. They haven't
18 charged it out. They haven't alleged that his act or his
19 alleged act of cracking this 14-year-old kid on the head
20 was a crime or anything that they are seeking to impose any
21 penalties for. This is pure propensity evidence and
22 inflammatory. So I would ask it be excluded.

23 THE COURT: When I read that boy's testimony, it
24 didn't come across strongly to me. So before he would
25 testify, I do want to have a hearing out of the presence of

1 the jury on that, because I want to be able to see him in
2 the courtroom and make that decision. So until that time,
3 nobody is going to talk about the crack on the head. Does
4 everybody understand that?

5 MR. MILLER: Yes, sir.

6 THE COURT: All right. I want to assess his
7 testimony, because there are cracks on the head, and then
8 there are cracks on the head, so to speak. A significant
9 crack on the head is probative. On the other hand, you
10 know, a boxing, so to speak, on the head is probably not.
11 That's why I want to actually see that testimony, just so
12 both sides understand where the Court is coming from on
13 that.

14 MR. KHOROOSI: Could I take a brief 30-second
15 recess?

16 THE COURT: Sure.

17 (Pause)

18 MR. KHOROOSI: Thank you, Your Honor.

19 THE COURT: Defendant moved for an order
20 prohibiting FBI Agent Mertz from sitting at the counsel
21 table. I denied that.

22 Fifth, the Defendant moved for an order prohibiting
23 the Government from displaying autopsy photographs or other
24 images of the body of the decedent. The Government
25 indicated in response that around 12 to 20 of the 161

1 autopsy photographs that were taken were going to be
2 offered.

3 What I did then, I wanted the Government to provide
4 those to the Court so I could look at them, which I did
5 yesterday. The ones that I saw yesterday, which were
6 Exhibits 9A, 9B, 9C, 9D, 9E, 9F, 9G, 9H, 9I, 9J, 9K, 9L,
7 those are the ones that I reviewed.

8 I'll ask the Government, are these ones that are all
9 going to be the subject of expert testimony or not?

10 MR. MILLER: Yes, Your Honor.

11 THE COURT: Those are ones that can be
12 introduced, because, from what the Court understands of the
13 case, these are the ones that would be relevant to the
14 expert testimony. Mr. Khoroosi?

15 MR. KHOROOSI: Your Honor, I fail to see how
16 Exhibit 9A would be relevant to expert testimony. If the
17 issue is identification, we'll stipulate to the fact that
18 Dr. Froloff performed an autopsy on A.C. I don't think
19 there's any probative value to be gained. I could be
20 wrong, but I can't see any from 9A.

21 THE COURT: That would be the only one I would
22 wonder about. What about that?

23 MR. MILLER: Your Honor, that is why Exhibits 9A
24 and 9B are being introduced is for the purpose of
25 identification. I appreciate Mr. Khoroosi's willingness to

1 stipulate to it. We may accept that stipulation, but I
2 don't think we have to or are compelled to. I would like
3 to at least reserve the right to still put them in, because
4 they are relevant to identification.

5 THE COURT: Well, 9B with testimony would
6 establish identification.

7 MR. MILLER: But it doesn't show the person, so
8 we don't know who that tag is attached to.

9 THE COURT: Well, then how does that connect with
10 9A? Because the medical record number is not shown on 9A.
11 There's another number on 9A, ME 20120090, and the medical
12 record number on 9B is 5004458.

13 MR. MILLER: The witness that took the
14 photographs can tie the two photographs together, and
15 that's Dr. Froloff.

16 THE COURT: It seems to me 9B would do that,
17 coupled with his testimony. You've already indicated to me
18 you need his testimony to tie 9A to 9B, anyway.

19 MR. MILLER: Again, one of the issues with 9B is
20 we don't see who it is attached to. As you can see, the
21 reference is to Dr. Storm. This tag was put on before the
22 child left North Dakota. This tag was not put on the
23 little girl by Dr. Froloff. He can testify that the tag
24 was there, but he's not the one that actually placed it.

25 THE COURT: Mr. Khoroosi?

1 MR. KHOROOSI: Your Honor, all of those issues
2 are moot. We're stipulating on the record that the child
3 Dr. Froloff identified was A.C.

4 THE COURT: Well, the Government doesn't ever
5 have to accept a stipulation unless the Court finds that
6 the evidence is inflammatory.

7 MR. KHOROOSI: I believe it is, Your Honor. I
8 mean this is precisely one of the types of evidence we were
9 seeking to exclude by making that motion in limine.
10 There's absolutely no probative value if the matter has
11 been stipulated to seeing the entirety of a child's dead
12 body. It's a horrifying sight, a shocking sight. Most of
13 the jurors, I'm fairly certain, won't have seen that
14 before. It's gruesome evidence that shouldn't be included.

15 THE COURT: 9A will not be received. If there's
16 any issue with regard to identity, then, you know, because
17 if the defense raises any issue or even intimation of
18 identity, then 9A will come in. That's the way we'll
19 handle it.

20 9B and the rest of the exhibits I indicated will come
21 into evidence.

22 MR. KHOROOSI: I would like to request that the
23 photos be redacted to remove areas of the decedent's face,
24 specifically, as far as 9C goes, there's an area where the
25 flesh around her clavicle is cut away. That's absolutely

1 no probative value. The testimony and the case, as I
2 understand it, will center around injuries to the top of
3 the child's head and forehead. There's no reason to show
4 any other part of the body. Besides that, these pictures
5 are all in digital format. They are easy to crop. I would
6 offer the same objection to 9D.

7 THE COURT: Beg your pardon?

8 MR. KHOROOSI: I would offer the same objection
9 to 9D.

10 THE COURT: 9C and 9D are the two. Right?

11 MR. KHOROOSI: 9C and 9D, yes, Your Honor. You
12 can see fluid in the child's ear in 9D. That could lead to
13 an improper presumption that the actions of the Defendant
14 caused bleeding in the child's ear. None of that is in the
15 medical records, and it won't be borne out in the
16 testimony, I believe.

17 THE COURT: Well, we'll see about that as to 9D.
18 I think it's supposition to say that that isn't somehow
19 related to the medical testimony. We'll see if there's
20 foundation for 9D in the testimony as to why -- that
21 there's a reason that 9D is there. With regard to 9C, what
22 about beneath the head, the opening of the body for the
23 autopsy? How is that medically relevant?

24 MR. MILLER: Your Honor, the photos we have
25 offered are undoclocked. We didn't want to alter them at

1 all. We marked the photos as they existed.

2 THE COURT: I understand that, because this is an
3 autopsy photo. But what's to prevent the part of 9C
4 underneath the head of the child from being covered?

5 MR. MILLER: Nothing.

6 THE COURT: Do it then.

7 MR. KHOROOSI: The remainder of my objections
8 have to do with Photographs 9E, 9F, 9G, 9J, 9K, and 9L. I
9 think for purposes of testimony, Dr. Froloff can talk about
10 where in the child's body, through the use of diagrams,
11 through the use of indications, through use of his own
12 words, where this child's injuries were.

13 I think it's incredibly prejudicial and incredibly
14 inflammatory to show such gruesome and bloody evidence to
15 the jury. We would object to that, as well.

16 THE COURT: What's the Government's response?

17 MR. MILLER: Your Honor, autopsy pictures are not
18 a new thing in homicide cases. They've been introduced
19 many, many times. These pictures will aid Dr. Froloff and
20 the other expert witnesses in explaining the injuries
21 they're seeing, they saw when they did this, and the
22 relevance to those. So I think it would aid the jury in
23 understanding the expert's testimony. So, therefore, we
24 feel that the photographs are more probative than
25 prejudicial and should be admitted.

1 The other thing I wanted to indicate, so I didn't
2 forget, is we also have the CD, which was just marked as
3 Exhibit 9 which we intend on introducing. It is not our
4 intention to have that exhibit to go back to the jury.
5 It's basically for the Court file. So if the objections
6 raised by the Defendant, if they are overruled, the
7 totality of the pictures can be reviewed by an Appeals
8 Court so they can already see some -- that there's been
9 some selection process where we eliminated many of the
10 photos that were available to come down to essentially
11 these ten, because the first two were identification
12 photos. We don't intend on Exhibit 9 to go back to the
13 jury.

14 THE COURT: From reading the experts' reports,
15 both the defense expert, as well as the Government's
16 experts, the Court understands it's a question of single
17 blow versus multiple blows essentially. To the extent that
18 the rest of the exhibits that are objected to are necessary
19 for the Government expert to talk about multiple blows, and
20 that's the way the Court understands it at this point, and
21 if that foundation is laid by the Government's expert, with
22 these demonstrating what they're at least, in part, basing
23 their opinion on, they will come into evidence. So that's
24 overruled.

25 So Exhibit 9A is out. That objection was sustained.

1 Exhibit 9C will be altered with the portion of the child
2 beneath the child's head being covered over.

3 No. 6 of the Defendant's motion in limine was an order
4 prohibiting the Government from introducing testimony or
5 report of Dr. Kenneth Snell because it was claimed there
6 was no timely disclosure. The Government responds to say
7 it was sent on July 12, and the defense has not requested a
8 continuance to address any new expert material, and the
9 Court is going to be instructing the jury not on counting
10 numbers of witnesses or expert witnesses on one side or the
11 other, and remind me to do that. So that's denied.

12 Then No. 7, the Defendant moves to exclude portions of
13 the forensic interview of a child referred to as T.C.
14 relating to what his parents allegedly told him about
15 A.C.'s death and T.C.'s willingness or ability to tell the
16 truth.

17 The Government, in responding to that motion in
18 limine, advises it does not plan on offering evidence from
19 T.C., nor does it plan on offering the forensic interview
20 of T.C. So that's granted, but as moot.

21 MR. MILLER: Your Honor, may I say one thing on
22 that?

23 THE COURT: Yes.

24 MR. MILLER: Yesterday when we got to Court, we
25 were provided exhibits and a witness list from the defense.

1 T.C.'s name was on there. If T.C. were to testify during
2 the Defendant's case and testifies to something contrary
3 than what is in that forensic interview, then our position
4 is going to change.

5 THE COURT: Yes. If T.C. is called by the
6 defense and there's something in that interview that would
7 be impeachment, you can certainly use it.

8 MR. KHOROOSI: T.C. was also disclosed in the
9 Plaintiff's witness list, as well. I don't know whether
10 they intend to call him or not. It could have been just
11 good measure. We would still like that testimony excluded
12 unless he said something substantively that's contrary to
13 what he said in the interview.

14 THE COURT: Well, I'll rule on that if he
15 testifies and if it comes up.

16 MR. KHOROOSI: Thank you.

17 THE COURT: I've already ruled to Defendant's
18 motion to sever Count 4, Document 77, which was granted.
19 That concludes the motions in limine.

20 With regard to jury selection, both sides have tried
21 cases before this Court before. You know I'll try the case
22 with one alternate. The defense gets 11 objections. The
23 Government gets seven. The peremptory challenge will go
24 one for the Government, two for the defense, one for the
25 Government, two for the defense, one for the Government,

1 two for the defense, one for the Government, two for the
2 defense. Then one for the Government, one for the defense,
3 one for the Government, one for the defense, one for the
4 Government, one for the defense.

5 So, in other words, the first four rounds of
6 objections, the Government gets one, the defense gets two
7 in each of those rounds. Then Rounds 5, 6 and 7, each side
8 gets one peremptory challenge. Any questions from the
9 Government?

10 MR. WRIGHT: Yes, if I may. The other trials
11 I've had with you, Your Honor, you restricted our voir dire
12 of counsel to 15 minutes. Will that be the rule in this
13 case?

14 THE COURT: Yes.

15 MR. WRIGHT: The second question I have is
16 counsel for the defense told me last week they may be
17 attempting to introduce exhibits in the opening statement
18 or referencing exhibits. We resist that and ask no
19 exhibits be shown to the jury until they've been received
20 in trial.

21 THE COURT: Well, what are we talking about?

22 MR. KHOROOSI: Your Honor, I've supplied the
23 Government with photographs. The exhibits I will actually
24 intend on referencing in my opening statement are a couple
25 of photos of the decedent that foundation will be laid

1 during our case in chief.

2 The other is a photo -- is an aerial photo of
3 Mr. Contreras' residence that denotes his home as well as
4 the home of his uncle, Dennis Gill. Those are there for
5 the demonstrative aid of the jury. The rest of my
6 PowerPoint presentation consists of slides I drafted with
7 bullet points on it. It's all words. There are no images.

8 THE COURT: What are the two pictures of the
9 deceased?

10 MR. KHOROOSI: The one I have in color,
11 Your Honor, and the other I provided an electronic copy to
12 counsel, but I have a black-and-white copy here for the
13 Court.

14 THE COURT: I want to see what you are proposing
15 to show to the jury. Or is it on your PowerPoint?

16 MR. KHOROOSI: It's on my PowerPoint. I can show
17 it to the Court.

18 THE COURT: No. Let me see the black-and-white
19 for now.

20 MR. KHOROOSI: May I approach?

21 THE COURT: You may. You can use these in
22 opening.

23 We're going to have a logistical issue in that we have
24 59 potential jurors, and we have a lot of spectators.

25 So what I'm going to have to do is have the spectators

1 stand over in the aisle. So it's clear on the record, this
2 is the biggest courtroom that we have. There are three
3 jury courtrooms here in this Federal Courthouse. This is
4 the biggest one that we have, and we don't have enough room
5 for all the spectators to sit and all the prospective
6 jurors to sit.

7 Counsel, here is what I'll suggest. I normally never
8 predraw the jury, because we draw 31 to begin with. What
9 we could do is, contrary to my normal practice, draw the
10 31, and have them come in and be seated, and have the
11 others remain outside. If we have to call somebody up
12 because somebody gets excused, then we'll just call them
13 in.

14 That's the only way we can accommodate it. This is a
15 public trial, and the Defendant has a public trial right to
16 have people present, other than the prospective jurors.
17 That's how I propose to do it, which is contrary to my
18 normal practice.

19 My practice is always to allow, of course, all the
20 spectators to be there at all stages of the trial unless
21 the courtroom was closed for some reason. There is no
22 reason to close it now. Does the Government have any
23 objection to that procedure?

24 MR. WRIGHT: No, we don't, Your Honor.

25 MR. KHOROOSI: No, Your Honor.

1 THE COURT: So sit tight for a minute, and we're
2 going to predraw 31. Then we'll call those 31 in here and
3 administer an oath to them. Then if we need additional,
4 we'll have them brought in, and they'll have to be given a
5 separate oath. That's just the way we'll have to do it.

6 MR. WRIGHT: We do have one other matter we'd
7 like to discuss with the Court.

8 THE COURT: What's that?

9 MR. WRIGHT: If the Court is going to allow the
10 Defendant to use exhibits on the opening statement, the
11 Government would like to use certain exhibits on the
12 opening statement, as well, then.

13 THE COURT: What?

14 MR. WRIGHT: We'd like to use Exhibits 4 and 8 on
15 the opening statement.

16 THE COURT: Let me see them. I have them up
17 here. Just a minute. What is 8? I can't find 8 in the
18 exhibits that were given to the Court.

19 MR. WRIGHT: May I approach?

20 THE COURT: Yes. You can use 4. You can't use 8
21 because of the cause of death that's stated in 8.

22 MR. WRIGHT: May I address another issue?

23 THE COURT: Yes.

24 MR. WRIGHT: I thought I heard counsel say he was
25 going to present a PowerPoint possibly in the opening

1 statement. We would object to that, because we haven't
2 received a copy of that. We provided them with all the
3 discovery in this case.

4 If they are going to use a PowerPoint, they should
5 have given us a copy well before this time. There is case
6 law that PowerPoints routinely are not allowed in opening
7 statements.

8 THE COURT: I can't hear you.

9 MR. WRIGHT: We would object to them giving a
10 PowerPoint without providing that to us. We still haven't
11 seen it or know what they're talking about.

12 The case law, as we understand it, says PowerPoints
13 are only allowed in the discretion of the Court. The other
14 side has at least 24 hours to review it before the opening
15 statement. We haven't seen it.

16 THE COURT: I'm not aware of any 24-hour rule. I
17 think the defense did contact my secretary and ask if they
18 could use a PowerPoint, and I said yes. I'm not aware of
19 any 24-hour rule.

20 MR. WRIGHT: It's my understanding there is case
21 law. United States vs. Burns, Sixth Circuit case. I know
22 it's not binding in this circuit, but just common
23 discovery, exchange of discovery we think should preclude
24 that. We asked for the PowerPoint last Thursday. They
25 said they would get it to us, and we haven't received it.

1 We object because we haven't seen it at this point.

2 THE COURT: Did you give them an outline of your
3 opening statement? Of course not. That's what a
4 PowerPoint is, as far as I'm concerned. The objection is
5 overruled.

6 Have you predrawn 31?

7 THE CLERK: We have, Your Honor. She's lining
8 them up.

9 MR. KHOROOSI: Could I address a couple brief
10 matters first?

11 THE COURT: What?

12 MR. KHOROOSI: I would like to ensure we are to
13 reference minors by their initials.

14 THE COURT: No. Names. It's too confusing to
15 the jury otherwise. You have A.L. and A.J., and they can't
16 keep them straight.

17 MR. KHOROOSI: How long will counsel be allowed
18 for opening and closing?

19 THE COURT: I don't limit opening and closing.
20 Well, I do limit closing. I set the time on that.

21 On opening, I don't limit that, but remember this:
22 Opening statement is opening statement. It's not opening
23 argument. If you start to argue, I'll sustain an
24 objection, and the same is true with regard to the
25 Government. If they start to argue, I'll sustain an

1 objection.

2 Remember, opening statement is supposed to be a
3 thumbnail sketch of what the case is. It isn't supposed to
4 be a long exposition. But I don't limit opening statement.
5 That's a matter of good sense for counsel. Closing
6 argument, I do.

7 MR. KHOROOSI: I have one more matter I would
8 like to make a record on. Could we approach the bench?

9 THE COURT: You may.

10 (Side bar with all counsel, out of the hearing of
11 everyone:)

12 MR. KHOROOSI: Your Honor, it's come to my
13 attention over the weekend, and I've made Mr. Wright aware
14 of this. I believe one of my witnesses is being threatened
15 with the loss of her job if she testifies. I wanted to
16 make a record on that. She does intend to obey the
17 subpoena and testify here.

18 I've never had that happen before. I don't know how
19 the Court would deal with something like that. There have
20 been threats from my witness' I think administrative
21 supervisor that if she testifies in Court, she will lose
22 her job at the IHS Hospital in Sisseton.

23 THE COURT: Well, there's such a thing as
24 obstruction of justice. We can't deal with that right now,
25 but we'll deal with it at a recess. Before we recess for

1 lunch, bring it up then.

2 MR. KHOROOSI: Thank you.

3 MR. WRIGHT: I wanted to apologize for being late
4 yesterday. I had an emergency to take care of in my
5 office. I thought Mr. Miller was just going to handle this
6 in court. I thought you were just going to set it for this
7 morning. So I apologize for being late and making you
8 wait, sir.

9 MR. MILLER: Your Honor, the issue of the child's
10 name. One of the things I see happen in the past, and I
11 don't know how this Court does it, is even though we may
12 use the child's name, the court reporter just puts the
13 initials in, and that way if there's appeal, we don't have
14 redaction issues. I have no objection to that method being
15 used.

16 THE COURT: That would simplify things, because
17 I've had cases where the court reporter did put the name in
18 and we had to redact the record.

19 MR. KHOROOSI: The issues arise here where there
20 are the same initials for two children. I know there are
21 two M.C.s that were in my client's house at the time.

22 THE COURT: We're going to use names. That's all
23 there is to it. Let me ask the court reporter if that
24 works or not. Just put the names down. Anything else?

25 MR. WRIGHT: No, sir.

1 (End of side bar)

2 THE COURT: I have a high frequency hearing loss.
3 I have no trouble at all hearing Mr. Khoroosi. Sometimes I
4 do have a problem hearing you, Mr. Wright. So you either
5 have to use the podium or make sure the microphone is
6 pointed up towards you.

7 MR. WRIGHT: Yes, sir.

8 THE COURT: It's a difference in timbre of
9 voices. It's just surprising. I have no trouble at all
10 hearing you, Mr. Khoroosi, even though you speak at the
11 same volume.

12 MR. WRIGHT: Your Honor, you are the first person
13 that's ever told me they had trouble hearing me.

14 THE COURT: There are times I have not had any
15 trouble hearing. I'll say that.

16 Now we have 31 jurors to bring in. We'll bring in
17 those 31, and we'll administer an oath or affirmation to
18 them as they choose. The rest of them are going to stand
19 in the back, because we don't have room enough to bring
20 them in, I don't think. We'll see.

21 (Voir Dire was held and filed in a separate, sealed
22 transcript)

23 THE COURT: You are going to have a late lunch.
24 Administer an oath now to these jurors. If you would
25 please stand.

1 (Jury, sworn)

2 THE COURT: Please be seated. When you come
3 back, I'll give you some preliminary instructions. I'm
4 going to give you an instruction now, even before you've
5 heard any evidence or before you've heard the other
6 preliminary instructions. This deals with essentially new
7 technology.

8 Members of the jury panel, if you have a cell phone,
9 PDA, Blackberries, smart phone, Iphone, or any other
10 wireless communication device with you, please take it out
11 now and turn it off. Do not turn it to vibrate or silent.
12 Power it down. That's when you come back. At lunch you
13 can, but you can't use it to look up anything.

14 I understand you may want to tell your family, close
15 friends, and other people about your participation in this
16 trial so you can explain when you are required to be in
17 Court. You should warn them not to ask you about this
18 case. You should not tell them anything that you know
19 about the case or discuss the case in any way with you.

20 You must not post any information on a social network
21 or communicate with anyone about the parties, witnesses,
22 participants, charges, evidence or anything else related to
23 this case, or tell anyone anything about the jury's
24 deliberations in this case until after I accept your
25 verdict or until I give you specific permission to do so.

1 If you discuss the case with someone other than one of
2 the jurors during deliberations, you may be influencing
3 your verdict by their opinions. That would not be fair to
4 the parties and result in a verdict not based on the
5 evidence and law.

6 While you are in the Courthouse and until you are
7 discharged in this case, do not provide any information to
8 anyone by any means about this case. For example, do not
9 talk face to face or use any electronic device or media,
10 such as a telephone, cell, or smart phone, camera,
11 recording device, Blackberry, PDA, computer, Internet, any
12 Internet service, any text or instant messaging service,
13 any Internet chat room, blog, or website, such as Facebook,
14 MySpace, YouTube, or Twitter, or any other way to
15 communicate to anyone any information about this case until
16 I accept your verdict or until you've been excused as a
17 juror.

18 Do not do any research on the Internet, in libraries,
19 newspapers, or any other way, or make any investigation
20 about this case.

21 Do not visit or view anyplace discussed in this case,
22 and do not use Internet programs or other devices to search
23 for or to view anyplace discussed in the testimony.

24 Also, do not research any information about the case,
25 the law, and the people involved, including the parties,

1 the witnesses, the lawyers, or the Judge, until you've been
2 excused as jurors.

3 The parties have a right to have this case decided
4 only on the evidence they know about and that has been
5 presented in the Court. If you do some research or
6 investigation or experiment that we don't know about, your
7 verdict may be influenced by inaccurate and incomplete or
8 misleading information that is not contested by the trial
9 process, including the oath to tell the truth and by
10 cross-examination.

11 Each of the parties is entitled to a fair trial
12 rendered by an impartial jury, and you must conduct
13 yourself so as to negate the integrity of the trial
14 process.

15 If you decide a case based on information not
16 presented in Court, you will have denied the parties a fair
17 trial in accordance with the rules of this country, and you
18 will have done an injustice. It's very important you abide
19 by these rules. Failure to follow these instructions could
20 result in a case having to be retried.

21 Now, a lot of that deals with technology with
22 exception of the telephone. I've been trying cases as a
23 trial lawyer, and now as a Judge for almost 50 years.
24 Twenty-five years ago I would have heard that instruction
25 and said, "What are they talking about?" Most of those

1 things didn't exist then, except for the telephones.

2 We have had problems in Federal cases and state cases,
3 too, where people have done Internet research. It seems
4 some people think when we tell you not to do research is
5 looking in a book. But it isn't. Obviously the Internet
6 is research, too. That's the reason for those admonitions,
7 which before used to be a lot simpler than they are now.

8 It's five after 1:00. We'll recommence at 2:00.

9 A JUROR: Judge, so we can notify our place of
10 work?

11 THE COURT: Yes, you can. Thank you. Please
12 stand for the jury.

13 (The jury left the courtroom)

14 (Recess at 1:05 until 2:05)

15 (In open Court, counsel and Defendant present, at
16 2:05 p.m.)

17 THE COURT: Good afternoon.

18 (Preliminary instructions read to the jury)

19 THE COURT: Counsel for the Government may make
20 opening statement.

21 MR. MILLER: Thank you, Your Honor. May it
22 please the Court, counsel.

23 Ladies and gentlemen of the jury: Aleeyah Cook died
24 on January 11, 2012. She had turned two years old just 12
25 days earlier. The evidence will show that the last five

1 days of her life, prior to being admitted to the hospital,
2 she was in the care and custody of the Defendant in this
3 case, Mario Contreras.

4 About that time Aleeyah was getting ready to enter
5 Head Start. As part of a child entering Head Start, she
6 had to go through an assessment. Because of that, her
7 mother, Shannon Sine or Shannon Cook, on December 28, just
8 two weeks before Aleeyah passed away, her mother took her
9 to see Dr. Stellar Anonye, who was a doctor up there and is
10 a part of the Head Start assessment. Dr. Anonye did a
11 check of the child, a check of Aleeyah, and found her to be
12 a normal, healthy, two-year-old girl, just two weeks prior
13 to her death.

14 You will hear that Shannon Sine and Mario Contreras
15 had only been dating a short time when Shannon became
16 pregnant with Aleeyah. In fact, the relationship had
17 ended, had terminated before Shannon even discovered that
18 she was pregnant with Aleeyah. Shannon and Mario never got
19 married, and Shannon had full custody of Aleeyah.

20 The evidence will show that throughout much of the
21 first 22 months of Aleeyah's life, the Defendant was not
22 really a part of her life. He was an uninvolved parent.

23 The evidence will also show, however, that starting in
24 November of 2011, approximately two months before Aleeyah
25 died, the Defendant did begin to play a more active role in

1 her life. You will hear testimony regarding a specific
2 incident in late December of 2011, and on this particular
3 day the Defendant had his visitation with Aleeyah, and he
4 and Shannon had made arrangements to exchange or transfer
5 the custody of Aleeyah back to her mother, Shannon. That
6 arrangement was that they were going to meet at Teal's
7 Grocery Store in Sisseton.

8 When Shannon and her husband, Sam Sine, got to the
9 grocery store, Sam went inside to purchase some items.
10 When Sam came out, Aleeyah was there with the Defendant,
11 and Shannon will testify that Aleeyah pointed to Sam,
12 Shannon's husband, and said something about him being her
13 daddy. She ran to him, threw her arms around him, and they
14 exchanged a kiss.

15 Shannon will testify that the mood of that meeting
16 changed at that time, and that the Defendant appeared to be
17 bothered or upset by that display of affection from Aleeyah
18 to the Defendant.

19 You'll hear evidence of another visitation that the
20 Defendant had with Aleeyah. The evidence will show that on
21 January 4 of 2012, the Defendant came over to Shannon's
22 house and picked up Aleeyah after he got off work that day.
23 The evidence will show that from that moment to the time
24 she was admitted to the hospital on the morning of
25 January 9, the Defendant had continuous care, custody, and

1 control of Aleeyah. She was not with Shannon and Sam
2 during those five days prior to being admitted to the
3 hospital.

4 A few days after January 4th the Defendant contacted
5 Shannon and asked if he could keep Aleeyah for a few more
6 days. Shannon agreed to that. She didn't have a problem
7 with that. The evidence will also show on Sunday night,
8 January 8, Shannon and the Defendant talked again. During
9 that phone conversation the Defendant agreed to take
10 Aleeyah to Head Start on Monday morning.

11 A couple other conversations also happened during that
12 phone call on Sunday night. Shannon will testify that the
13 Defendant had made a request to have joint custody of
14 Aleeyah, because if he had joint custody, he wouldn't have
15 to pay his child support obligation anymore, and Shannon
16 will testify that there was some disagreement, some
17 argument between them, because Shannon was unwilling to do
18 that.

19 Shannon will also testify that she talked to Aleeyah
20 on the phone that night, and that Aleeyah appeared to be
21 her normal self and that everything appeared to be fine.
22 As a matter of fact, Aleeyah told her mother, "Night,
23 night," and "I love you." That was the last time Shannon
24 spoke to her daughter.

25 Not only will Shannon testify that everything appeared

1 to be fine on that Sunday evening of January 8, but the
2 evidence will also show that FBI Agent Rob Mertz talked to
3 the Defendant after this series of events, and the
4 Defendant confirmed on that Sunday, January 8, Aleeyah was
5 fine, healthy, and everything was okay.

6 On the morning of January 9, 2012, the evidence will
7 show the series of events began that led to Aleeyah's
8 death. As part of the testimony, you'll hear there were
9 two hospitals in Sisseton. Aleeyah was taken to one of
10 them on the morning of January 9. The Defendant worked at
11 the other. The Defendant worked at the Indian Health
12 Services Hospital in Sisseton.

13 I anticipate during the course of the trial you'll
14 hear the testimony of Rose Gaikowski, who was the
15 Defendant's immediate supervisor. She will testify that
16 she supervised him directly, and during the time he worked
17 underneath her, that there were some issues that she had to
18 address with him. Specifically, she began to notice the
19 Defendant was repeatedly tardy for work, particularly in
20 the morning when he was supposed to report to work at 8:00
21 a.m. It got to the point she had to sit down, talk to him,
22 and reprimand him for being late to work so often.

23 Because she noticed he was late to work so often, she
24 kind of indicated to him that if you are at work late in
25 the morning, you have to take time off for that. If you're

1 15 minutes late, you have to take a quarter of an hour off
2 because you are late for work too often.

3 Rose Gaikowski will testify that after all this
4 happened and she was contacted by law enforcement, she went
5 back and checked those records to see how often the
6 Defendant had taken leave, and the evidence will show that
7 between July 1 of 2011 and January 3 of 2012, the Defendant
8 had taken leave over a dozen times in a span of less than
9 an hour, because he had been tardy or late for work,
10 particularly in the morning when he was supposed to be to
11 work at 8:00 a.m.

12 The evidence will show on the morning of January 9 the
13 Defendant was at his home. You heard from the Indictment
14 that that is near Waubay, South Dakota. He was scheduled
15 to go to work, as Rose Gaikowski will testify to, at 8:00
16 a.m. that morning. However, the evidence will show he
17 didn't even wake up until 7:00 or 7:15 that morning.

18 The evidence will show that where the Defendant's
19 residence was near Waubay is about a 25-mile drive to
20 Sisseton where he worked. But because of the nature of the
21 roads, it actually takes longer than 25 minutes to make
22 that drive. So by the time the Defendant even got out of
23 bed that morning, he was behind the eight-ball for being
24 late to work yet again.

25 You already know, from what I said previously, that

1 Aleeyah spent the night with the Defendant. So not only
2 did he have to get himself ready for work that morning, he
3 had to get Aleeyah ready to leave to take her to Head Start
4 in Sisseton before he could go to work.

5 Shannon will testify that Aleeyah was not, the term I
6 used, she wasn't a morning person. She was a fussy kid in
7 the morning. She didn't like to get up. She didn't like
8 to get her hair combed. She was particularly out of sorts
9 in the morning. The evidence will show not only did the
10 Defendant have to get Aleeyah and himself ready for work,
11 he had another child there with him that spent the night,
12 and that is his four-year-old child, Miley Campbell. He
13 had to get her up and get her ready that morning, too.

14 During this statement the Defendant gave to Agent
15 Mertz, he told the agent he woke Aleeyah and Miley up
16 sometime around 7:30 that morning. He didn't even get the
17 kids up until a half hour before he was supposed to be at
18 work.

19 To further slow things down that morning, the
20 Defendant's ex-wife, Oyate, stopped over and dropped off
21 two more kids, seven-year-old Malia Leticia and 11-year-old
22 Teton Contreras. At that point the Defendant is home
23 alone, no other adults to help him with the kids, with four
24 kids all under the age of 10.

25 Sometime before 9:00 a.m. that morning the Defendant

1 and four-year-old Miley arrived at the Coteau Hospital in
2 Sisseton. Aleeyah is unresponsive. She's not breathing,
3 and she has no heart rate.

4 Later on, when Agent Mertz talks to the Defendant, the
5 Defendant indicated that he drove this 25-mile trip from
6 the area where he lived to the hospital at about 120 miles
7 an hour while performing CPR on Aleeyah during the trip.

8 The evidence will show there was something he did not
9 do that morning. He did not call 911. He did not call 911
10 to have the ambulance come out to his house and get
11 Aleeyah, nor did he call to say, "Have the ambulance meet
12 me partway. I'm going to start to head to the hospital,
13 but I want an ambulance to come out so we can meet partway
14 there." He did not do those things.

15 Once the Defendant arrived at the hospital with
16 Aleeyah, one of the things the doctors tried to do, the
17 evidence will show, is find out what happened. What caused
18 this that she is unresponsive? A family member at the
19 hospital is going to testify, and she's going to testify
20 that the Defendant was providing minimal information to the
21 doctors. That the doctors were having to probe the
22 Defendant to basically pry the information out of him to
23 get him to tell them what happened that morning.

24 Aleeyah's condition, when she presented at the
25 hospital in Sisseton, was so serious, that the decision was

1 made to Life Flight her out to the Sanford Hospital in
2 Fargo, North Dakota. It was two days later there at the
3 Fargo Hospital that Aleeyah died on Wednesday, January 11,
4 2012.

5 During the course of my opening statement I've made
6 some references to a statement that the Defendant gave to
7 FBI Special Agent Rob Mertz. That interview took place on
8 February 2, 2012, so approximately three weeks after
9 Aleeyah had passed away. The Defendant came to the
10 interview with his attorney, so the attorney could be
11 present for the interview.

12 During the course of this interview, the Defendant
13 gave his version of what had happened that morning of
14 January 9 of 2012. He indicated that he put Aleeyah on a
15 chair in the kitchen. So as part of Agent Mertz'
16 investigation, one of the things he went and did was he
17 went and secured that chair or the chairs in the kitchen as
18 evidence in the case. I anticipate during the course of
19 the trial that the chair will be introduced into evidence,
20 and you'll get a chance to see it.

21 One of the things that Agent Mertz did when he took
22 the chair into custody, he measured the height from the
23 seat of the chair, the top of the seat to the floor, and
24 that that distance was 25 inches, just one inch over two
25 foot tall from the top of the seat to the floor.

1 The Defendant went on to say when he put Aleeyah in
2 the chair, he gave her a banana and a cup of water. But as
3 I indicated, Aleeyah wasn't the only child he had to tend
4 to that morning. The Defendant then said, "I left Aleeyah
5 sitting on the chair with her banana and cup of water, and
6 I went in the other room, because I had to get Miley ready,
7 get her dressed and ready to go."

8 The Defendant told Agent Mertz that while he was in
9 the other room he heard a thump. He turned around and
10 looked and saw Aleeyah laying on the kitchen floor. He
11 described Aleeyah's appearance to Agent Mertz saying she
12 was lying on her back, her toes were pointing inward, she
13 was groaning, and her eyes were rolled up in her head.
14 When he picked her up, her legs were stiff, almost like she
15 was having a seizure at the time, and that she appeared to
16 be gasping for air.

17 The Defendant made the decision to take Aleeyah to an
18 individual that lived nearby, his uncle, Dennis Gill. He
19 had taken her there. The two men attempted to do CPR on
20 Aleeyah. Then Dennis indicated to the Defendant, "You
21 should take her to a hospital."

22 The Defendant left the house without Dennis, just him
23 and Miley and Aleeyah went, and that's when the Defendant
24 began the journey, began his trip to the hospital in
25 Sisseton.

1 As part of the case, I anticipate that you'll hear
2 testimony from three different doctors in this case. All
3 three doctors will testify that the injuries that they saw
4 on Aleeyah were inconsistent with the story that the
5 Defendant gave to Agent Mertz about Aleeyah falling off a
6 chair from a height of just a little over two feet.

7 The first doctor you'll hear from is Dr. Arne Graff.
8 He is a pediatrician that was at the Sanford Hospital in
9 Fargo, North Dakota, and he was involved in Aleeyah's care
10 and treatment after she was Life Flighted up to Fargo. He
11 will testify that a CAT scan was done, and the CAT scan
12 revealed that Aleeyah had a subdural hematoma. What's a
13 subdural hematoma? The evidence will show that that is
14 bleeding within the space between an individual's brain and
15 their skull.

16 After Aleeyah passed away, she was sent to the office
17 of the medical examiner in Ramsey County, Minnesota,
18 St. Paul, Minnesota, where Dr. Victor Froloff did an
19 autopsy on Aleeyah Cook. You'll hear Dr. Froloff testify
20 about the examination that he did, and the examination is
21 kind of multi-phased.

22 The first thing he did was an external examination,
23 just looked at how she appeared on the outside. As part of
24 that external examination, you'll hear evidence that
25 Aleeyah had long, dark hair, and you can see the dark hair

1 in the photograph on the TV. You really couldn't see much
2 of Aleeyah's head with all the hair, but Dr. Froloff will
3 testify that once you shaved her hair off, you could see
4 even externally multiple contusions on the outside of her
5 head.

6 Another part of the examination is an internal
7 examination, and some of that testimony may be kind of
8 uncomfortable, but it's basically where you look at the
9 person on the inside. As part of that, Dr. Froloff
10 examined Aleeyah's, the inside of her head to see what he
11 could see. He will testify that once he examined her
12 during the internal examination, he saw at least 15 areas
13 of points of impact on Aleeyah's head; 15, at least.
14 Dr. Froloff will testify that that many contusions, that
15 many points of impact is inconsistent with a single fall or
16 trauma.

17 As important as the number of contusions is where they
18 were. The doctors will testify about the head is divided
19 into various planes. You have the front, the top, the
20 back, and two sides. Dr. Froloff will testify that he saw
21 these contusions on four different planes of the head, the
22 top, both the left and right side, and on the front.
23 Injuries to that many areas of the head, that many planes
24 of the head, Dr. Froloff will testify in his opinion is
25 inconsistent with a single fall.

1 He will also testify regarding the pattern of the
2 injuries on the top of the head, and how the placement of
3 the injuries are consistent with the knuckles on a fist.

4 Dr. Froloff will also testify about the subdural
5 hematoma that was seen in the CAT scan at the Sanford
6 Hospital. He could see the subdural hematoma when he did
7 the internal examination, and he will testify that there
8 was no organization, is the medical term he used, to the
9 subdural hematoma. The evidence will show the significance
10 of the lack of organization to that subdural hematoma meant
11 the injury was acute, and that in the medical field the
12 word "acute" means within 72 hours of death, so within
13 three days.

14 Now, regarding the contusions or the bruising that he
15 saw, the 15 different areas of points of impact,
16 Dr. Froloff will testify that's not as easy to date or age.
17 However, in comparing one of the contusions to all the
18 others, that he can testify that in his opinion those
19 injuries all occurred -- I should say most of them occurred
20 all within the same time period, same time frame.

21 Dr. Froloff will testify that based on everything he
22 saw during the course of the internal examination, it was
23 his opinion, just like it was the opinion of Dr. Graff,
24 that what he saw, those 15 areas of contusions on the four
25 spheres is not consistent with a single fall as described

1 by the Defendant in his interview with law enforcement.

2 The third doctor you'll hear testimony from is
3 Dr. Kenneth Snell. He is the current coroner, I think the
4 term they use is medical examiner, for Minnehaha County
5 here in Sioux Falls. He didn't actually examine Aleeyah,
6 but at the request of our office he took all the different
7 records and he examined them so that he could give us his
8 insight, his opinion as to what happened.

9 His conclusion, his opinion was the same as that of
10 both Dr. Graff's and Dr. Froloff's in that due to the
11 number of contusions, the number of impact wounds on the
12 various planes, it is not consistent with a single fall
13 from a chair.

14 Dr. Froloff and Dr. Snell will both also testify
15 regarding the dating of these various injuries and their
16 acute nature, meaning within three days or 72 hours,
17 keeping in mind that Aleeyah spent two days, Monday to
18 Wednesday, in the hospital before she passed away.

19 Another piece of evidence you'll hear is what we refer
20 to here in Federal Court is an Indian in Indian Country
21 stipulation. One of the elements the Government has to
22 show is either the Defendant or the victim is an enrolled
23 member of a tribe, and that the location where the offense
24 occurred happened in Indian Country, which is a legal term
25 for within the exterior boundaries of a reservation. It's

1 those two elements that make it so we're trying the trial
2 in this courtroom here versus maybe a State Courthouse, for
3 any of you that sat in on a State Court trial.

4 There is a stipulation between the parties regarding
5 those elements. Essentially all that means is that on
6 those two elements, an Indian in Indian Country, there is
7 no dispute. That's not a contested issue in this case.
8 The other elements the Government has to prove are still
9 contested, but that those two are not.

10 At the conclusion of all the evidence and testimony
11 over the course of the following week, we're going to come
12 back to you and ask you to hold the Defendant accountable
13 for the death of his daughter, Aleeyah Cook. Thank you.

14 THE COURT: Mr. Khoroosi, would you like to make
15 your opening now or later?

16 MR. KHOROOSI: I'll make one now. Thank you,
17 Your Honor. May it please the Court, counsel.

18 Members of the jury, to say that this is a tragic case
19 doesn't begin to describe the nightmare that's been going
20 on for Mario Contreras for over a year and a half. We're
21 here today because on the morning of January 9, 2012, Mario
22 tried frantically to save his baby girl, but couldn't. The
23 death of this child sent a wave of grief through their
24 community, but it didn't take long for that grief to turn
25 to anger.

1 MR. MILLER: Objection, Your Honor. This is
2 argument. Not opening statement.

3 MR. KHOROOSI: Your Honor, the evidence will
4 show --

5 THE COURT: Just a moment. I didn't ask you for
6 any comment. Sustained. Go ahead.

7 MR. KHOROOSI: As you'll see over the next
8 several days, there simply isn't evidence to place blame on
9 Mario Contreras. To understand the case, it's necessary to
10 know a little about the people involved.

11 You've seen him before. This is Mario Contreras.
12 Mario is 35 and a former Marine. At the time of Aleeyah's
13 death, he worked at the IHS Hospital in Sisseton. This is
14 Aleeyah. She was Mario's seventh child. You'll hear Mario
15 had regular visitation with all of his kids, and Aleeyah
16 was no exception.

17 As you'll hear from a number of witnesses, Aleeyah was
18 a happy kid, the kind of kid you can't help but fall in
19 love with if you spend much time with her. This is what
20 Aleeyah looked like when she came into her father's custody
21 on January 4, 2012. That's Aleeyah on the left right
22 there. That innocent smile wasn't there. When Mario and
23 his family picked her up the week before she died, that's
24 how she looked. Her Aunt Vivian will testify to that.
25 She'll testify she was sickly. She was lethargic. She

1 just wasn't herself.

2 In fact, that whole weekend you'll hear testimony from
3 people, many of whom have never met Aleeyah before that
4 weekend, that she was vomiting. She was lethargic. She
5 was not herself. There was something off about her. She
6 wasn't as responsive.

7 Particularly she fell off a folding chair on Friday,
8 January 6th. The family was at a wake. I don't know if
9 any of you have been to a Native American funeral, but
10 there's a wake that lasts for quite a long time. It
11 involves the traditional singing and drumming where folks
12 sit around to drum, and they all beat the same drum and
13 sing. Mario was performing that service at the wake.

14 Aleeyah, always quick to make friends, was being taken
15 care of by some folks, some of whom didn't know her.
16 They'll testify that she fell off one of those chairs onto
17 the gym floor that the wake was being held in.

18 Now, on the Monday, January 9, 2012, Mario woke up in
19 the morning. He had two of his kids, Aleeyah and her
20 three-year-old sister. You'll hear that Mario's ex-wife,
21 Oyate, did drop off the kids, the older two kids at his
22 house. Those two kids went straight back into the bedroom,
23 as so many kids do, and turned on a Disney movie. Mario
24 continued to get himself ready for work and the little ones
25 ready to be dropped off at daycare and Head Start.

1 Mario sat Aleeyah on a chair at the kitchen table,
2 turned around to tend to his three-year-old. At that
3 moment his life changed forever. He heard a loud thump,
4 and he heard his daughter cry out. He ran over to her and
5 noticed she stopped moving. She wasn't breathing. Mario
6 panicked. He ran and got an ice pack. He didn't quite
7 know what to do.

8 This is the street Mario lives on. It's called Gill
9 Road in rural Waubay. It's not very close to any major
10 city or to any hospital. This is Mario's house. You'll
11 hear testimony that Mario got in the car and drove over to
12 the home of his uncle, Dennis Gill. You'll hear that
13 Dennis Gill was trained in CPR and had saved a child
14 before. Naturally Mario goes over there.

15 Dennis tries for a few minutes to revive Aleeyah, but
16 he can't. He tells Mario, "Take her to the hospital." So
17 Mario takes her to the hospital, the one he works at.
18 You'll hear testimony from Mario's then girlfriend, Brenda
19 Jackson, she'll tell you that Mario called her frantic on
20 the way up. Brenda also works at the IHS Hospital in
21 Sisseton. You'll hear she was instructed to prepare the
22 ER, because they were coming up.

23 Now, unfortunately Aleeyah didn't survive her stay.
24 In spite of Mario's best efforts, she died when the family
25 decided to pull life support on January 11, 2012.

1 You are going to hear a lot of expert testimony
2 regarding the causes of her injuries, regarding the
3 symptoms she was displaying when she came into Mario's
4 care. You'll learn that those symptoms, those seemingly
5 innocuous symptoms of just the common flu, common cold that
6 little kids get all the time, you'll hear those could have
7 been symptoms of a preexisting concussion. Aleeyah could
8 have already had a concussion when she came into Mario's
9 care.

10 You'll hear that a fall of an effective height of
11 about four to five and a half feet, because that's about
12 how high her head was off the ground, if she was in the
13 chair, if she climbed up onto the table, could be anywhere
14 from four to five and a half feet. You'll hear that's
15 sufficient to cause a fatal injury in a child, especially
16 one that had already suffered an injury.

17 You'll hear that dating injuries such as Aleeyah's is
18 not an exact science. You'll hear there is no way to tell
19 the exact age of those types of injuries. Not the
20 hematomas, not the hemorrhages, nothing.

21 As you listen to the testimony over the next few days,
22 I want you to keep in mind a few questions. These are
23 questions that will still exist in your mind at the end of
24 the trial.

25 MR. MILLER: Objection, Your Honor. This is

1 argument.

2 THE COURT: Sustained.

3 MR. KHOROOSI: We believe the testimony will show
4 that the Government cannot prove what caused the injuries,
5 when the injuries occurred, or who witnessed the injuries
6 or who caused the injuries. No one will testify that they
7 witnessed Mario Contreras do anything to his daughter that
8 weekend.

9 So we'll ask you to return the only verdict you can
10 from the evidence. Not guilty on all counts. Thank you.

11 THE COURT: Call your first witness.

12 MR. WRIGHT: Stellar Anonye.

13 STELLAR ANONYE, M.D.,
14 called as a witness, being first duly sworn, testified as
15 follows:

16 DIRECT EXAMINATION

17 BY MR. WRIGHT:

18 Q. Would you state your name, please.

19 A. Stellar Anonye Achampong.

20 Q. What is your occupation?

21 A. I'm a physician.

22 Q. Can you tell us where you received your undergraduate
23 education?

24 A. Central State University at Wilberforce, Ohio.

25 Q. What medical school did you attend?

1 A. College of Medicine and Dentistry of New Jersey.

2 Q. When did you graduate from medical school?

3 A. 1976.

4 Q. Did you do an internship?

5 A. Yes.

6 Q. What do I mean when I say an "internship"?

7 A. It's a one-year training after you finish medical
8 school.

9 Q. Where did you do that?

10 A. University of Maryland in Baltimore, Maryland.

11 Q. Did you complete your internship?

12 A. Yes.

13 Q. Did you also do a residency?

14 A. Yes.

15 Q. What do I mean by that?

16 A. It's another specialty training that you have to do
17 before you become a pediatrician, which is what I am.

18 Q. How long is a residency?

19 A. It's two years.

20 Q. Did you complete your residency?

21 A. Yes.

22 Q. Are you on staff at any hospitals?

23 A. Yes.

24 Q. Which ones?

25 A. Woodrow Wilson Keeble and Indian Health Care Center.

1 Q. Are you a member of any medical associations?

2 A. Yes.

3 Q. Which ones are those?

4 A. American Academy of Pediatrics.

5 Q. Are you currently engaged in the practice of medicine?

6 A. Yes.

7 Q. And where do you work?

8 A. Woodrow Wilson Memorial Keeble.

9 Q. I know it's difficult, but can you give us just a
10 rough estimate of the number of patients you've seen in
11 your career?

12 A. Oh, my goodness. I have no idea. Quite a few. I've
13 been practicing for over 37 years. I can't put an
14 estimate. I'm sorry.

15 Q. Does part of your work involve screening patients,
16 including children going to Head Start?

17 A. Yes.

18 Q. What do I mean by "Head Start"?

19 A. It's a Federal program that tries to give young
20 children -- they go to school and they learn the ABCs.
21 They have to count. It gives them a little training, so
22 they'll be ready to enter kindergarten.

23 Q. Why are the children screened before they start
24 Head Start?

25 A. To make sure they are in good health.

1 Q. In your practice did you see a patient to be screened
2 named Aleeyah Cook?

3 A. Yes.

4 Q. When you see a child to be screened for Head Start, do
5 you normally work off a checklist?

6 A. Yes.

7 Q. What does the examination consist of, ma'am?

8 A. For me, I usually examine the child from a general
9 exam, which is from your head to your toes.

10 Q. Are you doing an examination to see whether or not
11 there is anything wrong with the child?

12 A. Yes.

13 Q. On the checklist that you normally work off, do you
14 think you would recognize that again?

15 A. Yes.

16 MR. WRIGHT: May I approach the witness?

17 THE COURT: You may.

18 BY MR. WRIGHT:

19 Q. Doctor, I've just handed you what's been marked
20 Exhibit No. 1. Do you recognize that?

21 A. Yes.

22 Q. What is that?

23 A. It's a checklist that I used.

24 Q. For Aleeyah Cook?

25 A. Yes.

1 Q. Is that a true and correct copy of the screening
2 assessment you did on Aleeyah on December 28 of 2011?

3 A. Yes.

4 Q. Does it have her name on it?

5 A. Yes.

6 Q. Her birth date?

7 A. Yes.

8 Q. The date of the exam?

9 A. Yes.

10 Q. And do you make a reference yourself that she's a
11 healthy child?

12 A. Yes.

13 Q. Could I ask you to take this highlighter, please, and
14 on Exhibit No. 1 can you highlight the child's name?

15 A. Where?

16 Q. On that exhibit where it says Aleeyah's name.

17 A. Okay. (Witness complies)

18 Q. Can you highlight where it says birth date?

19 A. (Witness complies.)

20 Q. Would you highlight the date of the examination?

21 A. (Witness complies.)

22 Q. Can you highlight your note, "healthy child"?

23 A. (Witness complies.)

24 Q. Ma'am, what's been marked as Exhibit No. 1, is that a
25 true and correct copy of a business record of the IHS in

1 Sisseton?

2 A. Yes.

3 Q. Kept as part of the normal course of doing business?

4 A. Yes.

5 MR. WRIGHT: We offer Exhibit No. 1.

6 MR. KHOROOSI: No objection.

7 THE COURT: Exhibit 1 is received.

8 MR. WRIGHT: Your Honor, may I publish it?

9 THE COURT: You may.

10 BY MR. WRIGHT:

11 Q. If I could get you to look over your shoulder at the
12 screen. Is that the document that you just highlighted?

13 A. Yes.

14 Q. The top left-hand corner, does that have Aleeyah's
15 name on it?

16 A. Yes.

17 Q. Birth date of December 31 of '09?

18 A. Yes.

19 Q. Your examination date at the bottom of December 28 of
20 2011. Is that right?

21 A. Yes.

22 Q. And your note that she is a healthy child?

23 A. Yes.

24 MR. WRIGHT: Counsel, may it be stipulated that
25 Exhibit 2 is a correct calendar for 2011?

1 MR. KHOROOSI: That's correct.

2 MR. WRIGHT: We'd offer Exhibit 2 at this time,
3 Your Honor.

4 THE COURT: Very well. Sometimes I'll give you
5 an instruction that deals with evidence. Here the
6 Government prosecutor and the Defendant have stipulated,
7 that is, they've agreed that certain facts can be admitted,
8 which is this Exhibit 2. Is that correct?

9 MR. WRIGHT: Yes. We're offering it at this
10 time.

11 MR. KHOROOSI: No objection.

12 THE COURT: Very well. It's received.

13 MR. WRIGHT: Your Honor, with the Court's
14 permission, could the witness write something on the
15 calendar?

16 THE COURT: Yes.

17 BY MR. WRIGHT:

18 Q. Dr. Anonye, at a time I may need you to step off the
19 witness stand for a second. On the date of your
20 examination, December 28, 2011, can you take this pen from
21 my right hand. To the best of your ability, can you write
22 in that square "Aleeyah examined for Head Start." Let me
23 set this down. Would that be easier for you? Can you
24 write the word "healthy" down there?

25 A. (Witness complies.)

1 Q. Thank you.

2 MR. WRIGHT: No further questions.

3 THE COURT: You may examine.

4 MR. KHOROOSI: Thank you.

5 CROSS-EXAMINATION

6 BY MR. KHOROOSI:

7 Q. Good afternoon, Doctor.

8 A. Good afternoon.

9 Q. If I could have you take a look at Exhibit 1, how did
10 you obtain this information?

11 A. Which information?

12 Q. The information on Exhibit 1. Did you measure
13 yourself?

14 A. The nurse did that.

15 Q. The nurse did that?

16 A. Yes.

17 Q. And there is no space on this form for head
18 circumference. You didn't measure her head circumference.
19 Did you?

20 A. I give my nurses instructions. Whenever I did do any
21 child under three years of age, they had to do the head
22 circumference.

23 Q. That's not reflected here, is it?

24 A. No. I did not ask for it, so they didn't put it down.

25 Q. So you didn't ask them to do a head circumference?

1 A. This form did not ask for it.

2 Q. So that's not recorded.

3 A. Yes.

4 Q. Yes, that's correct?

5 A. That it's not recorded?

6 Q. Yes.

7 A. On this form.

8 Q. And you didn't examine -- let me rephrase that.

9 After December 28, 2011, you didn't have anymore
10 contact with Aleeyah. Did you?

11 A. No.

12 MR. KHOROOSI: Nothing further. Thank you.

13 THE COURT: Anything further?

14 MR. WRIGHT: No, sir.

15 THE COURT: You may be excused, Doctor.

16 (Witness excused)

17 THE COURT: Call your next witness.

18 MR. WRIGHT: Gary Gaikowski.

19 GARY GAIKOWSKI,

20 called as a witness, being first duly sworn, testified as
21 follows:

22 DIRECT EXAMINATION

23 BY MR. WRIGHT:

24 Q. Would you state your name, please.

25 A. Gary Gaikowski.

1 Q. Gary, this is a big room. Can you talk up nice and
2 loud for me?

3 A. Sure.

4 Q. What do you do for a living?

5 A. Captain of the police for the Sisseton-Wahpeton Oyate
6 Tribe.

7 Q. How long have you done that?

8 A. Twenty years.

9 Q. What are your standard duties?

10 A. I manage the police department, day-to-day operations,
11 oversee, take calls, respond, testify in Court.

12 Q. The Sisseton Tribe, are they housed on the Lake
13 Traverse Reservation?

14 A. Yes.

15 Q. Are you the chief of essentially the Tribal Police?

16 A. Yes.

17 Q. Can you explain the Tribal Police involvement as they
18 interact with the FBI?

19 A. Since we don't have FBI nearby, my officers and myself
20 are usually the first ones to respond to calls and
21 complaints throughout the Reservation.

22 Q. Does the FBI end up handling the investigation of
23 major felonies on the Indian Reservation?

24 A. Yes.

25 Q. Does your office handle the first response?

1 A. Yes.

2 Q. Do you normally work closely with the FBI agents?

3 A. Yes.

4 Q. Do any FBI agents live on the Reservation?

5 A. No.

6 Q. Do you live on the Reservation?

7 A. Yes.

8 Q. Now, in your capacity as chief of police, are you
9 frequently dispatched to calls?

10 A. Yes.

11 Q. Do you have officers that are dispatched, also?

12 A. Yes.

13 Q. But even though you are the chief, you still have
14 dispatch, you have to answer calls?

15 A. Yes.

16 Q. I want to ask you about Monday morning, January 12 of
17 2012. Do you recall that day?

18 A. January 12?

19 Q. January 9 of 2012.

20 A. Yes.

21 Q. Were you dispatched to a hospital in Sisseton that
22 day?

23 A. Yes.

24 Q. Does Sisseton have more than one hospital?

25 A. Yes.

1 Q. What are the two hospitals?

2 A. Indian Health Service and Coteau des Prairie Hospital.

3 Q. Which one were you dispatched to?

4 A. Coteau des Prairie.

5 Q. What was the nature of the dispatch?

6 A. Unresponsive juvenile.

7 Q. Did you arrive at the hospital?

8 A. Yes.

9 Q. As part of your duties, are you required to document
10 when you were dispatched to the hospital?

11 A. Yes.

12 Q. Do you recall when you were dispatched?

13 A. At 8:39.

14 Q. Can I assume that the time your police department uses
15 is military time?

16 A. Yes.

17 Q. So it would be 0839?

18 A. Yes.

19 Q. Is that what is contained in your report?

20 A. Yes.

21 Q. Now, Chief Gaikowski, did you end up going to the
22 hospital that morning?

23 A. Yes.

24 Q. At the hospital what did you observe?

25 A. As I entered, I wasn't sure exactly where I was going.

1 I went to the nurses station right away. I did observe
2 Mario Contreras standing in the hallway. Another couple
3 was in there. As I made my way closer, I seen usually
4 where they take care of emergency people. A nurse came
5 out. I identified her as Joan LaBelle.

6 Q. I'm not going to ask you what Ms. LaBelle said to you.
7 But did you talk to Ms. LaBelle at that time?

8 A. When I got closer, I asked what was going on.

9 Q. Did you see Mario Contreras there at the hospital?

10 A. Yes.

11 Q. Do you see that person in the courtroom?

12 A. Yes.

13 Q. Where is he at, please?

14 A. (Witness indicating.)

15 Q. Did you later contact the FBI regarding this incident?

16 A. Yes.

17 Q. Why was that, sir?

18 A. I got a call later back probably from the hospital
19 that the baby was getting flown out to Fargo MeritCare
20 Center. It's my responsibility to notify the FBI.

21 Q. You said that you were dispatched to the hospital on
22 the 9th at 0839. Is that correct?

23 A. Yes.

24 MR. WRIGHT: Your Honor, could we have the
25 Court's permission for the witness to leave the stand and

1 write that on the calendar?

2 THE COURT: You may.

3 MR. WRIGHT: Go ahead, please.

4 BY MR. WRIGHT:

5 Q. At the bottom part of January 9 can you write "0839"?

6 Can you write "Aleeyah at hospital"?

7 A. (Witness complies.)

8 Q. That's fine. Thank you. As the chief of the Tribal
9 Police, are you familiar with all parts of the Sisseton
10 Reservation?

11 A. Yes.

12 Q. Is the Sisseton Reservation what's normally referred
13 to as an enclosed Reservation?

14 A. Open Reservation.

15 Q. You know what I mean by a closed Reservation.

16 A. Yes.

17 Q. You can literally step off the Reservation and step
18 back on?

19 A. Yes.

20 Q. Is the Sisseton Reservation more of what they call a
21 checkerboard Reservation?

22 A. Checkerboard.

23 Q. Where there are different parts that are state land
24 and different parts that are Federal land?

25 A. Yes.

1 Q. Are you familiar with certain parts of the Reservation
2 that are near the Enemy Swim, Waubay area?

3 A. Yes.

4 Q. As the chief of police, does your police department
5 service calls that are made from Indian Country in that
6 area?

7 A. Yes.

8 Q. And as the chief of police, are you also familiar with
9 the first responders, like an ambulance or medical care
10 that can go to that part of the Reservation?

11 A. Yes.

12 Q. Is there an ambulance that would respond to a call if
13 it was made from the Waubay area?

14 A. Yes.

15 Q. You have worked, I assume, on a number of various
16 serious calls in your career?

17 A. Yes.

18 Q. Automobile accidents, fatalities, things like that?

19 A. Yes.

20 Q. Are you familiar with the process of an ambulance
21 meeting someone on a call?

22 A. Yes.

23 Q. Instead of going to a house, meeting someone in route?

24 A. Yes.

25 Q. Do they do that on the Sisseton Reservation in Waubay,

1 too?

2 A. Yes.

3 MR. WRIGHT: Thank you.

4 THE COURT: You may examine.

5 CROSS-EXAMINATION

6 BY MR. KHOROOSI:

7 Q. Sir, you're familiar with the Lake Traverse
8 Reservation?

9 A. Yes.

10 Q. Do you know where Mario Contreras lives near Waubay?

11 A. Yes.

12 Q. About how far is that from Sisseton?

13 A. About 26 miles to the Enemy Swim Housing.

14 Q. If I'm going the speed limit, how long will it take me
15 to get there?

16 A. A good 30, 35, 40 minutes.

17 Q. Could it be 45 minutes?

18 A. Give or take, yeah.

19 Q. It's not your testimony, sir, is it, that every person
20 who goes to the emergency room in Sisseton from out of town
21 calls 911 except Mario. Correct?

22 A. Explain.

23 Q. That's not your testimony today. Is it?

24 A. No.

25 MR. KHOROOSI: Nothing further. Thank you.

1 THE COURT: Redirect?

2 REDIRECT EXAMINATION

3 BY MR. WRIGHT:

4 Q. Gary, did I understand your testimony that the usual
5 amount of time driving the speed limit from the Defendant's
6 house to Sisseton is 35 to 45 minutes?

7 A. Yes.

8 MR. WRIGHT: Thank you. That's all.

9 THE COURT: Thank you. You may step down.

10 (Witness excused)

11 THE COURT: Next witness.

12 MR. WRIGHT: Rob Mertz.

13 ROB MERTZ,

14 called as a witness, being first duly sworn, testified as
15 follows:

16 DIRECT EXAMINATION

17 BY MR. WRIGHT:

18 Q. Would you state your name, please.

19 A. Robert Mertz.

20 Q. Your occupation?

21 A. Special Agent with the FBI here in Sioux Falls.

22 Q. And for how long?

23 A. I've been an agent for just over 11 years.

24 Q. And how long have you been with the Sioux Falls
25 office?

1 A. It's coming up on two years now.

2 Q. Prior to working in Sioux Falls, where did you work?

3 A. Prior to Sioux Falls, I was stationed in Bemidji,
4 Minnesota. I was there four years. Before that I was in
5 Seattle, Washington, headquarter city.

6 Q. Prior to working for the FBI, what did you do?

7 A. Number of jobs, sales rep, director of business for a
8 small nursing home, that kind of stuff.

9 Q. In your capacity as an FBI agent in Sioux Falls, do
10 you work any particular kind of cases?

11 A. I primarily work violent crimes on Indian
12 Reservations.

13 Q. Is that generally called Indian Country cases?

14 A. Yes.

15 Q. Indian Country is a legal term. It's right in the law
16 book. Is that correct?

17 A. Yes.

18 Q. Do you work a certain group of reservations?

19 A. Yes. Out of the Sioux Falls office, Aberdeen is also
20 included in the Sioux Falls office. From Sioux Falls we
21 cover the Yankton Tribe, the one just north of us,
22 Flandreau, and on occasion we help out the Aberdeen office
23 with the Sisseton Reservation.

24 Q. And when you -- prior to working for the Sioux Falls
25 office, you said you worked in Bemidji?

1 A. Yes.

2 Q. Did you work what's called Indian Country cases there?

3 A. Exclusively.

4 Q. What Reservation would that be?

5 A. Red Lake Indian Reservation.

6 Q. Can you explain to us the relationship of the FBI in
7 working Indian Reservation cases?

8 A. We're the lead basically. Any major felony that comes
9 off the Reservation, we're the primary responsibility to
10 investigate the crime.

11 Q. Are you one of the agents that's been involved in this
12 investigation involving the Defendant, Mario Contreras?

13 A. Yes. I'm the lead agent.

14 Q. Have you done a number of interviews on this case?

15 A. Yes.

16 Q. And reviewed a number of reports?

17 A. Yes.

18 Q. Was one of your responsibilities to do an interview
19 with the Defendant on February 2 of 2012?

20 A. Yes.

21 Q. And did you interview the Defendant on that day?

22 A. Yes. Myself and another agent, Derrick Ahrens from
23 our office.

24 Q. The person you interviewed, do you see him in the
25 courtroom?

1 A. Yes, I do.

2 Q. Where is he?

3 A. He's sitting at the Defendant's table.

4 Q. Did he have an attorney with him at that interview?

5 A. He had an attorney, and the attorney also had an
6 assistant with him.

7 Q. Present at the interview?

8 A. Yes.

9 Q. Where was this interview held at?

10 A. It was in Sisseton at one of the Tribal offices, I
11 believe.

12 Q. Was this interview set up between the Defendant's
13 attorney and you?

14 MR. KHOROOSI: Objection, Your Honor. Could we
15 approach?

16 THE COURT: You may.

17 (Side bar with attorneys:)

18 MR. KHOROOSI: I object to the repeated mention
19 of the use of an "attorney" in the interviews. There's no
20 suppression issue here. It only serves to imply guilt
21 because you have to bring an attorney. I let it go in
22 opening statement. I think we have a mistrial here.

23 THE COURT: Overruled.

24 (End of side bar)

25 THE COURT: Go ahead.

1 BY MR. WRIGHT:

2 Q. So when you met with the Defendant that day, on TV
3 they always talk about the Miranda rights. Did you advise
4 the Defendant of the Miranda rights that day?

5 A. No, I did not.

6 Q. Why is that?

7 A. His attorney was present there with him.

8 Q. Was the Defendant in custody that day?

9 A. No, absolutely not.

10 Q. Is it your understanding that you only need to advise
11 of the Miranda rights if a person is in custody?

12 A. Correct.

13 Q. He was not in custody?

14 A. No, he wasn't.

15 Q. Did you discuss with Mr. Contreras the events that
16 took place between January 4 and January 9, 2012?

17 A. Yes.

18 Q. In fact, your interview with him would have been about
19 three to four weeks after Aleeyah had passed away. Is that
20 right?

21 A. That's correct.

22 Q. Did Mr. Contreras admit to you that he received
23 Aleeyah on Wednesday, January 4?

24 A. I believe that was the date, yes.

25 Q. During the course of that interview, did he tell you

1 whether or not he ever asked Shannon's permission to keep
2 Aleeyah for a couple more days?

3 A. Yes, he did.

4 Q. Do you recall which day he did that?

5 A. I know for sure it was a Sunday night on the 8th, he
6 called and asked if he could keep her overnight.

7 Q. To take her to Head Start the next day?

8 A. Right. The initial arrangement was to return Aleeyah
9 to her mother Sunday night, but they agreed that
10 Mr. Contreras would take Aleeyah to Head Start, and the
11 mother would pick her up after.

12 Q. Now, did you ask Mr. Contreras how Aleeyah was doing
13 on the previous day, which would be Sunday, January 8, of
14 2012?

15 A. Yes.

16 Q. What did Mr. Contreras say about Aleeyah's condition?

17 A. He said she was fine.

18 Q. In fact, Agent Mertz, did you ask him twice during the
19 interview if there was anything wrong or visibly wrong with
20 Aleeyah on Sunday the 8th?

21 A. Yes.

22 Q. Both times he said she was just fine?

23 A. She was just fine.

24 Q. Did he tell you what he said happened to her on the
25 morning of January 9?

1 A. Yes. He said --

2 Q. We'll get to that in a second. Did he tell you
3 whether or not there were any other children in the house
4 on the morning of the 9th?

5 A. Yes, there was.

6 Q. What did he say in that regard?

7 A. His ex-wife, Oyate, dropped off two of their children
8 they have together at approximately 7:30 in the morning.
9 They went into the back room and began watching TV. Mario
10 was at his house with Aleeyah and another young child.

11 Q. Did Mr. Contreras tell you that he, therefore, had
12 four children under the age of 11 with him at the house
13 there on Monday morning?

14 A. Yes.

15 Q. Did he identify any other adult that was there with
16 him that morning?

17 A. No.

18 Q. Did he say whether or not he had permanent custody of
19 all these children?

20 A. He didn't say.

21 Q. Did Mr. Contreras tell you whether or not he had to be
22 to work that particular morning of January 9?

23 A. He didn't say anything about work in the morning.

24 Q. But he said there were four children there. Is that
25 right?

1 A. That is correct.

2 Q. Did he identify where all the children were in the
3 house?

4 A. Yes.

5 Q. What did he say in that regard?

6 A. The two children that Oyate dropped off went to the
7 back bedroom, like I said before. He said he placed
8 Aleeyah on a chair in front of the table and gave her a cup
9 of water and a banana. Then his other daughter was in the
10 living room, and he was going to change her.

11 Q. The two children in the bedroom were children of the
12 Defendant and Oyate?

13 A. Correct.

14 Q. And the child, Aleeyah, was with the Defendant and
15 Shannon?

16 A. Yes.

17 Q. And the fourth child there was with the Defendant and
18 another child. Is that right?

19 A. That's correct.

20 Q. Did the Defendant tell you that he had Aleeyah, he sat
21 her on the chair?

22 A. That's what he told me.

23 Q. Then what did he say happened?

24 A. He said after he set Aleeyah on the chair and put her
25 at the table, gave her the water and banana, he went over

1 to change his other daughter. That's when he heard a
2 thump. He turned around and saw Aleeyah lying on the
3 kitchen floor. She was groaning. He said her eyes were
4 already rolling back into her head. He motioned that her
5 toes were starting to point in and stiffen up.

6 Q. Did he tell you the last time he saw Aleeyah she was
7 sitting on the chair?

8 A. That's what he told me.

9 Q. Did he ever say he saw her standing on the chair?

10 A. He didn't tell me that.

11 Q. Did he ever say he saw her standing on the table?

12 A. He didn't say either.

13 Q. Did he ever say he saw her sitting at the table?

14 A. He didn't say that.

15 Q. Did he ever say he saw her trying to climb up?

16 A. No.

17 Q. The last time he saw her she was just sitting in the
18 chair?

19 A. Yes.

20 Q. That chair and table from the Contreras residence, was
21 that eventually seized by you pursuant to a Search Warrant?

22 A. Yes, it was.

23 Q. Describe what a Search Warrant is.

24 A. Basically I draft an Affidavit of Facts and present it
25 to a Judge and say, "This is what I believe," and support

1 it by facts, and the Judge grants a Search Warrant for me
2 to seize those items from the house.

3 Q. It requires a Judge's signature for you to take that
4 table and chair from the house?

5 A. Yes.

6 Q. Is that chair and table currently in the Federal
7 Building?

8 A. Yes.

9 Q. We are going to show that to the jury later in the
10 trial?

11 A. Yes.

12 Q. Did you measure the chair that you seized from the
13 Contreras residence?

14 A. Yes.

15 Q. How high is the chair?

16 A. From the floor to the seat of the chair is actually 24
17 inches, but there's about an inch of padding on there. So
18 to be level with the padding, it's 25 inches.

19 Q. Did you measure the length of the table -- height of
20 the table is a better question.

21 A. Yes. The height of the table is 36 inches or three
22 feet.

23 Q. After Aleeyah supposedly fell, did the Defendant tell
24 you about the trip he made into Sisseton with her?

25 A. Yes.

1 Q. Did he tell you anything about performing CPR in the
2 car?

3 A. Yes.

4 Q. What did he say in that regard?

5 A. He told me he was performing three-finger CPR while he
6 was driving into the Reservation, approaching speeds of 120
7 miles an hour.

8 Q. Before he left that area to go to the hospital, did he
9 tell you anything about seeing his Uncle Dennis Gill next
10 door?

11 A. Yes. He drove over first to Uncle Dennis Gill's
12 residence for his assistance in performing CPR.

13 Q. Did he say whether or not he left Mr. Gill's house to
14 go to the hospital?

15 A. Yes. After he left Mr. Gill's house, yes, he went to
16 his hospital.

17 Q. Did he identify if he took any of the kids with him
18 besides Aleeyah?

19 A. He took the other one that he was changing her
20 clothes. Not the two that Oyate dropped off. They stayed
21 in the back bedroom.

22 Q. Those two did stay in the bedroom. He took another
23 child and Aleeyah on this trip to the hospital?

24 A. Yes.

25 Q. Did Mr. Contreras ever tell you why Mr. Gill didn't go

1 with him to the hospital?

2 A. No.

3 Q. Did Mr. Contreras say he was the only adult that drove
4 the two children to the hospital?

5 A. Yes. That's my understanding. He and the two young
6 kids.

7 Q. Did he tell you how fast he was driving?

8 A. Approaching speeds of close to 120 miles an hour.

9 Q. How did he tell you he was doing CPR while doing that?

10 A. He said he was doing three-finger CPR.

11 Q. Did you understand what that meant?

12 A. Not exactly, no.

13 Q. During the course of the interview with the Defendant,
14 did he admit to you that he hadn't been much involved in
15 Aleeyah's life during the first 22 months?

16 A. I would say that's fair, yes.

17 Q. It wasn't until just the last couple of months that he
18 started spending some time with her?

19 A. Yes.

20 MR. KHOROOSI: I'll object. Counsel is leading.

21 THE COURT: Sustained.

22 BY MR. WRIGHT:

23 Q. There was a reference in the opening statement that
24 Aleeyah may have fallen on a folding chair Friday night at
25 the gym. Did he mention that to you during your interview?

1 A. Yes.

2 Q. What did he say in that regard?

3 A. Toward the end of the interview he said, "By the way,
4 there could have been a couple other incidents." One, he
5 said basically the chair collapsed on her, and she fell on
6 the folding chair, as well as falling in the shower earlier
7 during his care, too.

8 Q. That was also during that weekend. Is that right?

9 A. Yes.

10 Q. So the Defendant essentially told you that she fell in
11 the shower on Saturday night?

12 A. She fell in the shower. I'm not sure of the exact
13 day.

14 Q. Do you have your report with you?

15 A. Not in front of me, no.

16 Q. Would it refresh your recollection to look at that?

17 A. Yes. That is correct, Saturday.

18 Q. Did the Defendant tell you she fell at the gym Friday
19 night, she fell in the shower on Saturday, and she fell
20 Monday morning?

21 A. Yes.

22 Q. Did he tell you whether or not he took her to the
23 doctor for either of those first two falls?

24 A. No.

25 Q. Did he tell you why he didn't take her to the doctor?

1 A. No.

2 Q. Did he tell you that he was concerned with either one
3 of those supposed falls she had earlier?

4 A. I can't say that. He mentioned them, but it didn't --
5 he didn't say he went and sought medical attention.

6 Q. In fact, after he mentioned those two falls, isn't
7 that when you asked him the second time was this child okay
8 on Sunday, the 8th?

9 A. I wanted to clarify that on Sunday night the child was
10 fine, and he did clarify for me.

11 Q. What did he say?

12 A. That she was fine.

13 Q. Was that consistent with what he told you earlier in
14 the interview that she was just fine on the 8th?

15 A. On the 8th, Sunday night, yes.

16 MR. WRIGHT: Could I ask if he can leave the
17 witness stand and write on the calendar?

18 THE COURT: You may.

19 BY MR. WRIGHT:

20 Q. Would you, please? Your interview was on February 2.
21 Right?

22 A. Yes.

23 Q. Our calendar doesn't go all the way to that date. On
24 the bottom could you write "2-2-12"? Bigger than that.
25 Right down here just write, "Mario said Aleeyah okay."

1 Actually he used the word, "Fine." Didn't he?

2 A. Yes, he did.

3 Q. Right down here on January 8.

4 A. (Witness complies.)

5 Q. Thank you. You can resume your seat.

6 MR. WRIGHT: I have no further questions.

7 THE COURT: You may cross-examine.

CROSS-EXAMINATION

9 BY MR. KHOROOSI:

10 Q. Agent Mertz, you testified that you hadn't read Mario
11 his Miranda rights. He came voluntarily. Didn't he?

12 A. Yes.

13 Q. You didn't have to arrest him before he would talk to
14 you?

15 A. No, sir.

16 Q. You asked him to come down and he came down. Correct?

17 A. No. Actually I coordinated through his attorney, Gary
18 Montana, at that time.

19 Q. But you asked him to come down through his then
20 attorney, and then he came down.

21 A. That's correct.

22 Q. In your report, it's not your testimony that you asked
23 Mario about Aleeyah's condition and he just said fine. Is
24 it? He told you more about her condition than that.
25 Didn't he?

1 A. Yes, he did.

2 Q. He told you she was vomiting.

3 A. Earlier in the week, yes.

4 Q. He told her she was a little clingy that weekend?

5 A. Yes.

6 Q. He told you they thought she had the stomach flu.

7 Didn't he?

8 A. I don't know if it was the flu. I know she was
9 running a low-grade temperature, and they were concerned
10 about that so they gave her some Pedialyte before they --

11 MR. KHOROOSI: Your Honor, may I approach?

12 THE COURT: You may.

13 BY MR. KHOROOSI:

14 Q. Sir, if I showed you your report, would that refresh
15 your recollection?

16 A. Sure.

17 Q. I draw your attention specifically to the second
18 paragraph in the second page, Bates stamped 3. Mario's
19 girlfriend believed that she had the flu. Correct?

20 A. Yes.

21 Q. As part of your investigation -- strike that. You
22 mentioned there were other children in the house. Correct?

23 A. Correct.

24 Q. You were present at the interview of Teton Contreras.
25 Correct?

1 A. Yes, I was.

2 Q. You made a report on that. Didn't you?

3 A. Yes.

4 Q. Teton told you about his recollection that morning.

5 Didn't he?

6 MR. WRIGHT: Objection. Calls for hearsay.

7 THE COURT: He can answer yes or no. Overruled.

8 The next question might be hearsay. We'll see.

9 BY MR. KHOROOSI:

10 Q. Teton told you about what happened that morning.

11 Didn't he?

12 A. Yes, sir. Can I clarify?

13 Q. No. You've answered my question. Thank you.

14 After you observed this forensic interview, Teton's
15 forensic interview, you compiled a report. Didn't you?

16 A. Yes.

17 Q. Generally whenever you interview someone or witness an
18 interview done, it's your typical practice to make a report
19 of that interview. Isn't it?

20 A. Correct.

21 Q. You recorded your recollections in a report for Teton.

22 Is that correct?

23 A. Yes. Typically it's an FD 302.

24 Q. Something like I just showed you earlier?

25 A. Yes.

1 Q. Those are documents regularly kept by the Federal
2 Bureau of Investigation?

3 A. Yes. It's maintained in the file.

4 Q. Maintained in the routine course of business?

5 A. Yes.

6 Q. Now, during the interview what did Teton tell you --

7 MR. WRIGHT: Objection. Calls for hearsay.

8 THE COURT: Sustained.

9 BY MR. KHOROOSI:

10 Q. You also interviewed Leticia Malia Contreras. Didn't
11 you?

12 A. I didn't interview her. She was in a forensic
13 interview, and I witnessed it, yes.

14 Q. So you witnessed the forensic interview?

15 A. Yes.

16 Q. Just like Teton, you compiled a report after that
17 interview was conducted?

18 A. Yes.

19 Q. And you created a 302 report?

20 A. Yes, if that's the report.

21 Q. I'm handing you what's marked Exhibit 115. That's
22 your 302 report. Isn't it?

23 A. Yes. This is my summary recapping the interview,
24 forensic interview of Leticia Malia.

25 MR. KHOROOSI: Your Honor, I'd offer Exhibit 115.

1 MR. WRIGHT: We strongly resist, Your Honor.

2 It's hearsay. He's trying to put in a statement of a
3 witness that's not testifying.

4 THE COURT: I understand what hearsay is.

5 Sustained.

6 BY MR. KHOROOSI:

7 Q. Agent Mertz, based on your investigation of this
8 incident, you couldn't determine that Mario was raising his
9 voice that morning. Could you?

10 A. That would be a fair statement. Nobody could
11 determine that.

12 Q. You couldn't determine from the course of your
13 investigation that Aleeyah was crying loudly that morning.
14 Could you?

15 A. Correct.

16 MR. KHOROOSI: I have nothing further. Thank
17 you.

18 THE COURT: Anything further?

19 MR. WRIGHT: Just briefly.

20 THE COURT: Very well.

21 REDIRECT EXAMINATION

22 BY MR. WRIGHT:

23 Q. Agent Mertz, Mr. Khoroosi asked you some questions
24 about Aleeyah's condition earlier during the time the
25 Defendant had her, the 4th, 5th, and 6th. The bottom line

1 is, did he tell you twice that she was fine on the 8th?

2 A. Yes, he did.

3 MR. WRIGHT: Thank you.

4 THE COURT: Anything further?

5 MR. KHOROOSI: Nothing further.

6 THE COURT: Thank you. You may step down.

7 (Witness excused)

8 THE COURT: We'll take a 15-minute recess.

9 Remember what I told you. Don't be looking at your cell
10 phone or doing any kind of research. Also, don't talk to
11 each other about the case at this time. Keep that to
12 yourself, because the time to talk to each other is the
13 time when you are deliberating at the end of the case.
14 Then you have to consider the opinions of others, and you
15 have to deliberate together, but not now. Just keep an
16 open mind until all the evidence is in.

17 We'll be in recess for 15 minutes. Please stand for
18 the jury.

19 (The jury left the courtroom)

20 (Recess at 3:45 until 4:00)

21 (Out of the presence of the jury, all counsel and Defendant
22 present, at 4:00)

23 THE COURT: I understand there's some 404(b)
24 information that might come from who you propose to call
25 for the next witness. Also, do you have another witness we

1 could call instead, so that then we could have the 404(b)
2 hearing after I let the jury go for the day?

3 MR. WRIGHT: Yes, sir, we do.

4 THE COURT: Let's do it that way then.

5 MR. WRIGHT: Yes, sir. We do have one.

6 THE COURT: All right. Bring in the jury.

7 (The jury entered the courtroom)

8 MR. KHOROOSI: Could I grab my expert witness?

9 My expert witness is observing.

10 THE COURT: All right. Call your next witness.

11 MR. MILLER: The Government calls Dr. Victor
12 Froloff.

13 VICTOR FROLOFF, M.D.,
14 called as a witness, being first duly sworn, testified as
15 follows:

16 DIRECT EXAMINATION

17 BY MR. MILLER:

18 Q. Sir, please introduce yourself to the jury.

19 A. My name is Victor Froloff. First name Victor,
20 V-I-C-T-O-R. Last name Froloff, F-R-O-L-O-F-F.

21 Q. Where are you currently employed?

22 A. I'm employed by Dr. McGee, who is Ramsey County
23 Medical Examiner.

24 Q. What is the name of the place you work for?

25 A. It's Ramsey County Medical Examiner Office.

1 Q. When you say "Ramsey County," is the office you work
2 for, is it a governmental office, or is it a private
3 company?

4 A. The office I work with is a Government office, so our
5 employer, investigators, technicians are Government
6 employers. They are a County employer, but I work for
7 Dr. McGee, and this is his private company, so I'm not a
8 Government employee.

9 Q. And what is your job title there for the Office of
10 Medical Examiner?

11 A. My official job title is an Assistant Medical
12 Examiner.

13 Q. And when you use the term "medical examiner," a term
14 that's maybe used more prevalently by the public is a
15 "coroner." Is it kind of the same thing?

16 A. It's a little bit different in that in the
17 United States and the different states, we have a different
18 system. We have, for example, in the State of Minnesota
19 and State of Wisconsin, we have two different systems.
20 It's called medical examiner system, which is usually run
21 by doctors, and we have a system. It's a dual system. I'm
22 not sure about the State of South Dakota. I think it's the
23 same.

24 So Dr. McGee is a medical examiner for Ramsey and for
25 Washington County. But he's also a coroner for other

1 counties.

2 Q. Would you describe for the jury your educational
3 background that led to the position you are currently
4 holding?

5 A. Sure. You'll probably hear my accent. I was born in
6 Russia. I'm Russian. I was born in Siberia. That's how I
7 guess I got in Minnesota. But I was trained in Russia. I
8 was a medical graduate from medical school over there.

9 Then I did one year of internship in internal
10 medicine, and then I practiced emergency medicine many,
11 many years, and then I came to the United States it's going
12 to be 20 years ago.

13 So I had to start all over again. So I studied. It's
14 very complicated to get your license here. You have to
15 study and have to pass some certain tests. So I passed
16 Step 1, Step 2, Step 3, and so on. When you pass, you are
17 able to -- you are allowed to look for residency, residency
18 programs.

19 So I found a residency program here at the University
20 of Minnesota. I graduated from residency program, and I
21 decided I would probably like to do forensic pathology. In
22 order to do forensic pathology, you have to be
23 subspecialized. So I took two fellowships in forensic
24 pathology in Milwaukee. It's the Milwaukee County Medical
25 Examiner Office and Medical College of Wisconsin. Then I

1 came back to Minnesota again.

2 Q. Now, you used the term that you did a residency in
3 forensic pathology. What is forensic pathology?

4 A. I did a residency in pathology, and I subspecialized
5 in a fellowship in forensic pathology.

6 Q. But that term, "forensic pathology," what is it?

7 A. Forensic pathology is a branch of medicine using
8 medical knowledge in legal cases.

9 Q. And that's your specialty, if I understood your
10 testimony correctly?

11 A. Yes.

12 Q. Are you licensed to practice medicine?

13 A. Yes. I do have two full nonrestrictive licenses in
14 the State of Minnesota and State of Wisconsin.

15 Q. You indicated where you went to medical school. Then
16 you continued your education and the internship and
17 residency you described.

18 After that did you begin working in the medical field?

19 A. Yes.

20 Q. Describe for us the various places that you've been
21 employed in the medical field.

22 A. Actually not very many places. I prefer to stay in
23 the one place. Back in the Soviet Union, now it's Russia,
24 I worked at a City Hospital for a period, as an emergency
25 medicine doctor. Then here I work basically for the

1 Medical Examiner at Ramsey County.

2 Q. How long have you been with Ramsey County?

3 A. I worked for Dr. McGee approximately six years.

4 Q. What are your duties or responsibilities as the
5 assistant medical examiner?

6 A. Assistant medical examiner or forensic pathologist by
7 indication, you know, responsible for numerous duties.
8 First of all, we do perform autopsies, examination of the
9 dead bodies. We are involved in the investigation with
10 cases of the violent deaths that's unusual circumstances,
11 homicides, accidents, suicides.

12 We are responsible for signing a Death Certificate
13 when, for example, a clinical doctor refuses to sign a
14 Death Certificate, we are responsible for that. We are
15 responsible for identification of the body, identify the
16 body. We are responsible to ID. So it's numerous duties.

17 Q. Do you do autopsies for jurisdictions or counties
18 outside of Ramsey County, St. Paul?

19 A. Yes, I do.

20 Q. How many different counties throughout Minnesota and
21 the surrounding states have you done work for as an
22 Assistant Medical Examiner?

23 A. Because Dr. McGee, he's acting coroner for 15
24 surrounding counties, so we do like routinely -- I wouldn't
25 say routinely, but we do cases for 15 surrounding counties

1 of the State of Minnesota. We also accept cases from
2 approximately 50 counties of the State of Minnesota and
3 State of Wisconsin and sometimes from South Dakota.

4 Q. And you indicated previously in your testimony that as
5 part of your job, you perform autopsies. Correct?

6 A. That's absolutely correct.

7 Q. Is that a normal part of your job duties or
8 descriptions?

9 A. Yes. That's correct.

10 Q. Just, in general, not maybe the specific case, but in
11 general, tell us how an autopsy is performed. What do you
12 do?

13 A. I usually describe to a jury, it's almost the same
14 like as coming to a normal doctor. We like to know what
15 happened, what the circumstances of the death. So you come
16 into doctor, and they ask what are your symptoms.

17 In forensic pathology we're trying to find out
18 circumstances of the death, what happened with the person
19 before he died. That's a very important part of the
20 examination. So we're trying to get as much information as
21 we can.

22 Then I perform autopsy. Autopsy is really composed of
23 three different parts.

24 First part is external examination of the body. I
25 have a body, so I look for evidence of injury. I look for

1 any damage of the body. Again, it depends what kind of
2 case. I have to collect trace evidence sometimes. I have
3 to collect DNA and so on. So it's an external examination
4 of the body. I document everything by performing
5 photographs and sometimes I make diagrams.

6 Second big part of autopsy is internal examination of
7 the body at the time of autopsy. I have to take all organs
8 out, basically cut body, cut brain, have to take organs
9 out. I have to look for damage of the organs or disease.

10 Third part of the autopsy is toxicology. At the time
11 of the autopsy we collect body fluids, such as blood,
12 urine. Sometimes we take fluid from the eye, called
13 vitreous humor. We can use liver tissue. We have to run
14 toxicology, because we have cases that people die from drug
15 overdose, for example.

16 Q. Now, you indicated how an autopsy is done.
17 Approximately how many have you performed throughout the
18 course of your career?

19 A. For me, it's too many. I know for sure it's over
20 2,050. I don't count autopsies anymore, because it's a
21 private practice where we're pretty busy. I used to do 350
22 autopsies a year, which is a lot. Now we do 250, 260
23 autopsies per year.

24 Q. Have you ever testified in Court before concerning the
25 autopsies you've performed?

1 A. That's another part of my job, so I have to -- I'm in
2 Court almost an average of twice a month.

3 Q. Specifically have you testified in Federal Court
4 regarding autopsies?

5 A. Yes. I testify in Federal Court.

6 Q. Would you say you testify more in State Court or
7 Federal Court, or is it pretty evenly split?

8 A. Well, I can just tell you that in Federal Court
9 probably half a dozen times. I'm not sure how many times I
10 testify in the State Court in the State of Wisconsin, State
11 of Minnesota. Again, we have a fairly busy office. It
12 could be a hundred times. I don't know.

13 Q. You testified previously that your Office of Medical
14 Examiners performs autopsies for outlying areas outside of
15 Ramsey County. Specifically, can you tell us how your
16 office became involved in the investigation in this case
17 regarding the death of Aleeyah Cook?

18 A. Sure. Dr. McGee had an agreement a long time ago with
19 North Dakota Commissioner that -- the North Dakota, Fargo
20 area has a fairly large hospital, I believe a Trauma 1
21 Center, so it's busy and people die. Unfortunately that is
22 a hospital when people die, and people transfer to this
23 hospital from South Dakota, North Dakota, and parts of
24 Minnesota, and they die there. They decided if people
25 transfer from Minnesota or South Dakota or wherever, they

1 can be autopsied by Ramsey County. In this case, the case
2 was reviewed by Cass County Coroner, I believe, according
3 to my knowledge. They decided to send the case to our
4 office to investigate.

5 Q. Did you personally perform the autopsy on Aleeyah Cook
6 yourself?

7 A. Oh, yes, of course.

8 Q. What was the date the autopsy was performed?

9 A. I performed autopsy on 12th of January, 2012.

10 Q. In doing the autopsy specifically in this case, the
11 one you did on Aleeyah Cook, did you follow the same
12 protocol in performing the autopsy that you previously
13 described for the jury?

14 A. Yes, of course.

15 Q. Would it be of benefit to you in testifying about the
16 autopsy exam you did to refer to your report from time to
17 time?

18 A. Sure.

19 Q. During the autopsy procedure did you take photographs?

20 A. Yes.

21 Q. Dr. Froloff, the first thing I'll show you is what's
22 marked Exhibit 9B, as in boy. I want you to look at it and
23 tell me yes or no. Do you recognize it?

24 A. Exhibit 9B. It's a hard copy of my --

25 Q. Just do you recognize what's in the picture?

1 A. Yes.

2 Q. Did you take that picture?

3 A. Yes.

4 Q. Does that picture accurately depict what is shown in
5 the photograph?

6 A. Yes.

7 MR. MILLER: I would move to introduce
8 Exhibit 9B.

9 THE COURT: 9B is received.

10 MR. KHOROOSI: Your Honor, could I approach?

11 (Bench conference with all counsel:)

12 MR. KHOROOSI: Instead of objecting to each
13 exhibit individually, can I have a standing objection to
14 all of Exhibit 9?

15 THE COURT: The only problem with that is I told
16 you my view with regard to their admission. They might not
17 properly establish foundation. For example, it might not
18 be necessary for him to have a particular exhibit in order
19 to explain to the jury what's being done. I'm not going to
20 -- I can't give you a standing objection. I might need to
21 be educated on a particular exhibit. For it to come in, I
22 have said if this is necessary in order to be able to show
23 to the jury what's going on. If it isn't, I'm not going to
24 let something in.

25 MR. KHOROOSI: Okay. Thank you.

1 (End of bench conference)

2 MR. KHOROOSI: Your Honor, I have an objection to
3 Exhibit 9B on relevancy grounds and under 403(b).

4 THE COURT: Overruled.

5 BY MR. MILLER:

6 Q. Doctor, now that it's been admitted into evidence, now
7 I can have you testify as to what Exhibit 9B shows.

8 A. Exhibit 9B is a hard copy of the name tag which we
9 used to attach to the body for identification purposes.

10 MR. MILLER: Your Honor, I had a picture of
11 Exhibit 9A of the actual individual for identification
12 purposes. My understanding is the defense is willing to
13 stipulate that the individual that Dr. Froloff did the
14 autopsy on is Aleeyah Cook. Thus, eliminating the need for
15 Exhibit 9A. But I want to make sure on the record we have
16 that stipulation regarding the ID.

17 MR. KHOROOSI: Actually I do not have an
18 objection. I'll withdraw my objection to 9B. I was
19 thinking of another exhibit. Thank you.

20 THE COURT: I wondered. In any event, with
21 regard to 9A, do you stipulate to identity?

22 MR. KHOROOSI: Yes.

23 THE COURT: Very well. Just a moment. I want to
24 give the jury an instruction on stipulations. The
25 Government, through its Prosecutor, and the Defendant have

1 stipulated, that is, agreed to certain facts that counsel
2 just stated. You must, therefore, treat those facts as
3 having been proved. In other words, that the autopsy was,
4 in fact, of the alleged victim in this case. Proceed.

5 BY MR. MILLER:

6 Q. Dr. Froloff, I'll show you what is marked Exhibit 9.

7 Do you recognize that?

8 A. Exhibit No. 9 is a CD copy of my pictures, which I
9 took during the autopsy.

10 Q. And you took approximately 160 pictures throughout the
11 course of the entire autopsy?

12 A. Yes, it's over 160 pictures. Yes, that's correct.

13 Q. Exhibit No. 9 would contain all the photographs you
14 took during the course of the autopsy?

15 A. I hope so. It's a copy.

16 Q. In looking at the 160 pictures, do they accurately
17 reflect the ones you took during the course of the autopsy?

18 A. Yes.

19 MR. MILLER: Your Honor, I would move to
20 introduce Exhibit No. 9 for purposes of the reasons we
21 talked about during the pretrial hearing. It is not our
22 intention that this exhibit would actually go back to the
23 jury during their deliberations.

24 THE COURT: Well, it won't. That's for purposes
25 of any appellate record that might be necessary.

MR. KHOROOSI: For those purposes, Your Honor, I have no objection.

THE COURT: Very well. Exhibit 9 is received for that limited purpose. The clerk's notes will reflect it does not go back to the jury.

BY MR. MILLER:

Q. Next, Doctor, I want to talk to you about the external examination. You testified previously that's the first part of any autopsy that you conduct.

During the course of the external examination you did of Aleeyah Cook, did you take photographs of that, as well?

A. Yes, of course.

Q. Doctor, I'll show you what's been marked Government's Exhibit 9C, 9D, 9I, and 9H. I'll have you look at those four pictures, and then I'll have some questions for you regarding foundation of those.

A. Sure.

Q. Did you take those four pictures?

A. Exhibits 9C, 9D, 9I, and 9H are a hard copy of the pictures I took during my autopsy.

Q. Those are four photographs that you took during the external portion of the examination you did?

A. Yes. That's one of the photographs, yes.

Q. Do they accurately represent how Aleeyah Cook looked on the day you did the external examination?

1 A. Yes. Those pictures I took after I completely shaved
2 her head. I had to do that to expose some injuries.

3 MR. MILLER: The Government would move to
4 introduce Exhibits 9C, 9D, 9H, and 9I.

5 MR. KHOROOSI: Your Honor, I do object to those
6 exhibits on grounds of relevancy, foundation, and they are
7 unfairly prejudicial under Rule 403.

8 THE COURT: Well, overruled as to relevancy and
9 foundation with regard to how they're taken. That's
10 overruled. But the necessity for using them hasn't been
11 established, so sustained as to that.

12 BY MR. MILLER:

13 Q. Dr. Froloff, would these pictures assist you in
14 describing to the jury the observations you made and the
15 opinions you have in this case regarding the autopsy you
16 did on Aleeyah Cook?

17 A. Yes.

18 MR. MILLER: I would reoffer these four exhibits.

19 MR. KHOROOSI: Same objection, Your Honor.

20 THE COURT: Just a moment. For the reasons the
21 Court sustained in the pretrial conference, the objection
22 is overruled. Very well. Exhibits 9C, D, H, and I are
23 received.

24 MR. MILLER: Your Honor, pursuant to the Court's
25 previous ruling, we cropped Exhibit 9C. Would the Court

1 like to see that before I publish it?

2 THE COURT: Well, yes, because I saw what you did
3 before and said that wasn't good enough. Let's see what
4 you did now. Yes, that's now satisfactorily cropped.

5 MR. MILLER: May I publish the picture?

6 THE COURT: You may.

7 BY MR. MILLER:

8 Q. You'll probably have to look over your right shoulder,
9 I believe it is, to the screen or monitor.

10 A. Sure.

11 Q. The first picture I'm going to put up is -- what's on
12 the monitor, Dr. Froloff, is Exhibit 9C. This is a picture
13 of Aleeyah Cook. You knew who she was?

14 A. Yes.

15 Q. I'm assuming when she came to your office for purposes
16 of the autopsy, that she had a full head of hair?

17 A. Yes.

18 Q. Did you shave her hair off for purposes of conducting
19 the autopsy?

20 A. Yes. That's part of the autopsy, yes.

21 Q. Tell us why. Why is that something you needed to do?

22 A. When I observed first this two-year-old baby, she was
23 wearing a clean diaper, she had really long black hair,
24 like a normal kid. Again, I performed I wouldn't say
25 routine stuff, but I collect trace evidence. In this case

1 we proceed that there might be potential charges, kind of a
2 suspicious case, so we have to collect. I perform sexual
3 assault kit. I collect fingernail clipping. We collect
4 some DNA stuff.

5 When I observe a body, she also had medical
6 intervention. She had tubes inserted into her, because she
7 spent three days at the hospital. So I photographed
8 everything, and then I took everything off her. She was
9 basically nude. Then started examine the body.

10 When I started to examine her head, I was able to see
11 some contusions. Contusions, it's a blunt force injury,
12 basically results from impact. So I was able to see some
13 really faint, like brownish contusions, and I suspected she
14 might have more contusions. That's the reason to shave her
15 hair. That's kind of routine practice. Again, nothing
16 routine about the case, but that's what we do.

17 So I used my scalpel to completely shave her head, so
18 I can see injuries to her head, and I was able to see more
19 injuries. That's why she looked completely without hair,
20 because I had to shave her.

21 Q. The reason you shaved her head was to allow you to
22 better see any injuries she may or may not have to her
23 head?

24 A. Yes. I needed to visualize her injuries. Yes.

25 Q. When we look at Exhibit 9C, describe for us what you

1 are attempting to show in taking this photograph. What do
2 we see in this picture?

3 A. Sure.

4 THE WITNESS: Your Honor, can I stand up?

5 THE COURT: You may.

6 A. Should I use my finger or a pen?

7 BY MR. MILLER:

8 Q. That's a question of the clerk.

9 MR. MILLER: Do you want us to touch the screen
10 with a pen, or leave a mark on the picture?

11 THE CLERK: Not a pen.

12 BY MR. MILLER:

13 Q. Not a pen.

14 A. That's fine. I'm an old-fashioned guy. I get used to
15 using a pen or pencil. So that's the girl's picture from
16 the right side of her head. That's my basically tag which
17 we use for identification purposes.

18 So I shaved her head. The reason I took this picture,
19 I tend to visualize -- if you look at her head, right here,
20 the skin is fairly normal color. But on the right side
21 it's -- the forehead area, you can see like maroon,
22 purplish, or brown contusion. Contusion is again blunt
23 force injury. That's what I'm trying to show. She had a
24 contusion on the right side of the forehead. That's the
25 reason I took the picture.

1 Second, it's really hard to see, but on the top of the
2 head, when I shaved her head, she had a healing abrasion.
3 We all have contusions. An abrasion is basically a
4 scraping of the skin as a result of the friction of the
5 skin when people lose dermis or the superficial layer of
6 the skin.

7 I was able to see a little contusion here, but I also
8 describe kind of like a ring-shaped abrasion, which looked
9 like old injuries. I measured four centimeters. That's
10 approximately one-half inches in diameter. So you can see
11 at least two injuries here.

12 Q. Now, during what you just indicated, you described the
13 injury on the top of the head as an older wound?

14 A. Again, she spent three days at the hospital. When
15 people spend three days at the hospital, injuries start to
16 heal. I just said it looks a little bit different, so I
17 described this as an abrasion covered by crust.

18 Q. When you talk about contusions and bruises and those
19 types of things, based on your experience and training, are
20 you able to date those types of injuries or tell us how old
21 they are?

22 A. That's a very complicated, difficult question in
23 forensic pathology. We have to deal with dating of the
24 injuries, especially contusions, all the time. The problem
25 is there is no single reliable method to date injuries.

1 Sometimes forensic pathologists use color, but even color,
2 people describe -- we all, probably 99 percent of the
3 people here with contusions, bruise. It still looks
4 brownish, starts to get purple at first, and then it's
5 changing color.

6 But the problem is that sometimes we heal differently.
7 After a certain period of time, the contusion on the skin
8 becomes blues and greenish and yellow colors. So we try to
9 use color, but it's not reliable.

10 What I did in this case, I sectioned almost every
11 injury in her head, and put it on a microscope to try to
12 date the injury. In Court at least I can say -- she spent
13 three days at the hospital. I can't give you an exact
14 time.

15 I know this injury, I described in the final autopsy
16 protocol and stated here that recent injury, which is
17 fairly fresh injury. I can tell you I know it's
18 approximately three days old. I can't distinguish three,
19 four, five days old.

20 Q. When you said you see an injury that's approximately
21 three days old, which of the two injuries you are showing
22 us in this picture are you referring to?

23 A. Well, once again, when I perform autopsy, I have to
24 look at all injuries, and try to come back together and put
25 everything together, and I extensively measure the

1 sections, all sections, all injury of the brain. All the
2 injuries looked fairly the same age, except the injury in
3 the full occipital area. Basically it's in the back of the
4 head looks a different age. But injury on the skull on the
5 right, left, and top looks the same.

6 Q. So even though you are not able to tell us how old
7 maybe the injuries are, do the injuries all appear to be of
8 a consistent age, other than the one you noted at the top
9 of her head?

10 A. Again, the injury at the top is an abrasion, and she
11 spent three days at the hospital. Under microscope they
12 look fairly similar.

13 Q. Let's move to the next photograph, Dr. Froloff. The
14 next picture is Exhibit 9D, as in dog. Tell us what this
15 picture shows.

16 A. Exhibit 9D again is a picture from the left side of
17 the body. I'm trying to document, because I find some
18 injury on the right side, I find some injury on the top of
19 the head, I find some injury in the front of the head, in
20 the middle of the forehead.

21 Here it's called a left forehead area. We can see
22 almost similar appearance injury here. Liner marks, like
23 whitish marks you can ignore. That's from my scalpel from
24 shaving, so we can see contusions in the left forehead area
25 there. You can see some, again, contusion and abrasion

1 here. It's hard to see here, with this reflection. But
2 it's also some contusion to the forehead, like in the
3 middle of the forehead.

4 Q. Are you able to date or age the injury we see in
5 Exhibit 9D?

6 A. It's the same age, like in the previous. It's the
7 same age.

8 Q. Dr. Froloff, you can't see it because it's clear down
9 at the bottom. I have now what's been marked as Exhibit 9H
10 on the monitor. Describe for the jury what we see in this
11 photo.

12 A. Again, we can see back of the head, called the
13 occipital area. The child, which I shaved with a scalpel,
14 you see remnants of the hair. The part on the lower neck,
15 this is like lower neck and shoulder area, it's a little
16 bit purplish, because it's still postmortem lividity when
17 people die. Why? Because the force of gravity goes down,
18 and after a certain period of time, her 12-hour stay there,
19 it's still postmortem lividity.

20 In forensic pathology we are trained to distinguish
21 injury from postmortem changes. But you can clearly see
22 here, and I described in the final autopsy protocol, this
23 area looks kind of whitish, normal skin. Here you can see
24 contusions in the back of the head. Again, I sampled this
25 area, and I performed microscopic examination.

1 Q. How many different contusions can you see in this
2 photograph?

3 A. I describe it kind of looks like speckled almost
4 appearance. I described two contusions in this area.

5 Q. You are using the pointer to draw a broad circle.
6 Would you point to No. 1?

7 A. Right here. It's again really faint. You can miss it
8 pretty easy if you don't shave. It's right here. (Witness
9 indicating).

10 Q. In terms of dating these injuries, how did they appear
11 in relationship to the other contusions we saw in
12 Exhibits 9C and 9D?

13 A. By appearance, you look at the contusions, look at the
14 contusion in the front looks almost alike. When I perform
15 microscopic examination, this contusion in the back of the
16 head looked a little bit different.

17 I think I have to tell you what happened. When people
18 have contusions, bruising, or hemorrhage inside the skin,
19 bodies start to heal it. So what we have, we have -- we
20 call it several reaction cells coming out trying to repair
21 the stuff. Because it's blood, some cells called
22 microphages, which is called scavenger cells, try to clean
23 up the contusions.

24 So what's happened, microphages come into this area
25 trying to clean it up. Erythrocytes, our red cells, are

1 composed of protein and iron. So what happened is those
2 microphages absorb this iron. When we perform microscopic
3 examination, we can see iron. Under the microscope it
4 looks bright blue, so I can see how much iron the cells
5 absorbed. So this is just one area that looks older in the
6 microscopic, because more cells are continuing to start.

7 Q. The last picture I have regarding the external portion
8 of the autopsy is Exhibit 9I. Tell us what this shows
9 differently than what 9H did, since they are both pictures
10 regarding the back of the head.

11 A. Exhibit 9I, again, I'm trying to play -- not play.
12 Just to look for light. We take a lot of photographs, and
13 I'm trying to show you injuries on the different angle, and
14 also trying to show more injuries.

15 So here in the back of the head, that's the two
16 previous contusions I described. But also on the side of
17 the head right here you can see additional injuries.
18 That's called right temporal area.

19 So basically I have a kid who has a number of
20 contusions present on the front, right, left side, in the
21 back, the top, and sides of the head. That's what I'm
22 trying to document.

23 Q. When you look at the additional contusions that you
24 see in this exhibit, can you date that in relationship to
25 the contusion shown in the various other exhibits, 9C, 9D,

1 and 9H?

2 A. Again, it's very complicated. I stated before, I
3 think it's similar injuries. I can't exactly date it.

4 Q. But in terms of their correlation to each other, do
5 they appear to have been inflicted at about the same time
6 frame?

7 A. In my opinion almost all the contusions, except in the
8 back one, were inflicted at the same time, yes.

9 Q. When you do the internal portion of the examination,
10 are you able to see these various contusions you've pointed
11 out during the external examination? Are you also able to
12 see them internally?

13 A. Yes. Blunt force injuries can be complicated in an
14 adult and kids. You can exclude blunt force injury because
15 nothing appears in the skin. In her case, I think she had
16 black, really thick hair. Hair works like a cushion. So
17 in order to better document her injury, we have to take the
18 skin off her head. Basically I do a scalping-type removal
19 of we call it subgaleal tissue. I have to peel her skin
20 from the front to back and make an incision from one ear to
21 the other one. I have to do that in order to visualize the
22 internal injury.

23 Sometimes, especially in kids, we'll look extensively
24 for injuries. We have to basically take the skin off to
25 look for injuries. Most of the time if we suspect some

1 kind of child abuse or whatever, we'll find injury
2 internally. To answer the question, yes, I peeled it off,
3 and I saw more damage to the skull.

4 Q. So you are able to see these internally?

5 A. Some of the injuries -- in my final autopsy protocol I
6 stated I counted approximately -- well, I counted eight
7 contusions on her head. When I performed the internal
8 examination, trying to find subgaleal hemorrhage, which is
9 damage to the subgaleal tissue, I was able to see more
10 injuries.

11 Q. Now, you indicated the subgaleal contusion is
12 something of the subgaleal level. Describe for us what
13 subgaleal is. Put it in lay person's terms.

14 A. It's called subgaleal hemorrhage. Subgalea is just a
15 specific term used for skin of the skull. That's what we
16 use in forensic pathology and in medicine. Skin of the
17 skull, anatomically, a little bit different than skin of,
18 for example, as a part of the body, because it's a thick
19 connective tissue. Skull tissue -- skull skin is firmly
20 attached to the bone. It's just like terminology, the
21 subgaleal tissue.

22 Q. You previously testified to these various contusions
23 shown in Exhibits 9C, 9D, 9H, and 9I. During the course of
24 your external examination, did you make other observations
25 during the course of the external portion of the

1 examination?

2 A. Sure.

3 Q. Please describe those for the jury.

4 A. Again, the final autopsy protocol had, I described, a
5 pinpoint area for abrasion. That's 0.1 millimeters
6 basically just pinpoint here and there of abrasion on the
7 left and right side of the face. I'm not sure about
8 significance of this injury. Just small, tiny, healing
9 abrasions. Because the kid spent three days at the
10 hospital, she had numerous attempts -- they were trying to
11 revive her. They were trying to put an IV. She had a
12 contusion and pinpoint area of abrasion in the venipuncture
13 sites. But I think it's just related to medical
14 intervention. I describe those findings separately in the
15 evidence of medical intervention.

16 Q. You then indicated that you moved on to the internal
17 portion of your examination. Is that correct?

18 A. Yes.

19 Q. Did you take photographs of those, as well?

20 A. Yes.

21 Q. Did the autopsy take place over the course of more
22 than one day?

23 A. I started the autopsy on the 12th of January at 9:30.
24 It took me a significant amount of time. I don't remember
25 when I finished, but when I found additional injuries, it's

1 the practice of our office to just hold the body until
2 second day, and come back and reexamine the body.

3 The reason is when you have this kind of faint
4 injuries, and we also have blood, and when blood drains,
5 because after autopsy, we have to take blood, and plus
6 people losing the blood because we are cutting all organs.
7 Basically blood -- there is no blood in the body. You can
8 visualize injuries better, because sometimes one huge
9 injury hemorrhage, the next day it looks a little bit
10 different. It helps us to visualize and better document
11 our case. So I believe I came back like the next day and
12 retook additional pictures of the skull.

13 Q. If I understand correctly, sometimes the second day
14 you can see things better than the day before?

15 A. Yes.

16 Q. Would these pictures regarding your external
17 examination help you to explain the observations that you
18 made and help the jury understand what you are describing
19 to them?

20 A. That's correct.

21 Q. Dr. Froloff, I'm going to hand you in a moment here
22 several exhibits, 9E, 9F, 9G, 9J, 9K, and 9L. I'll have
23 some preliminary foundational questions for you before we
24 get into what the pictures actually show. I'll show you
25 those. When you get done looking through them, I have some

1 questions.

2 A. 9C, 9F, 9G, 9J, 9K, and 9L. Those are one of the
3 pictures I took during my autopsy examination.

4 Q. These were all pictures you took of the area of
5 Aleeyah Cook's head during the course of the autopsy
6 examination?

7 A. That's some of the pictures, yes.

8 Q. Do they accurately reflect the area of the body you
9 photographed? In other words, do these pictures accurately
10 reflect what her head area looked like?

11 A. Yes.

12 MR. MILLER: Your Honor, I would move to
13 introduce Exhibits 9E, 9F, G, J, K, and L into evidence.

14 MR. KHOROOSI: Your Honor, I object on grounds of
15 foundation, relevance, and they're more prejudicial than
16 probative.

17 THE COURT: Overruled for the reasons previously
18 stated in the pretrial conference. They are received.
19 Exhibits 9E, F, G, J, K, and L are received.

20 MR. MILLER: May I publish?

21 THE COURT: You may.

22 BY MR. MILLER:

23 Q. Dr. Froloff, the first picture I want to talk to you
24 about is Exhibit 9. What does this show?

25 THE COURT: 9 what? You didn't say.

1 MR. MILLER: 9E.

2 A. This is kind of graphic. I have to explain what I
3 did. That's basically a picture reflecting the top of the
4 skull, and the top portion, it's a part of the body. The
5 body is open, so that's why you can see blood here. You
6 can see what looks like hair on the left side.

7 Again, what happened here --

8 BY MR. MILLER:

9 Q. First I'll ask you to stop, because you are going
10 beyond the question. Use the pointer on the big screen,
11 because the small screen is hard for the jury to see.

12 A. I'll start all over. That's my ID tag. You can see
13 some hair here. That's her body. Left shoulder, right
14 shoulder, and I told you I had to cut skin from one ear to
15 the other, front and in the back.

16 So when I opened her skull, I was surprised actually
17 to see injuries, but basically what you can see here,
18 that's her skull, top of the skull right here, and here is
19 basically skin which is pulled up and over her face. So
20 this is called subgaleal tissue. Basically we can see here
21 dark maroon, almost like red color here. That's called
22 subgaleal hemorrhage. Basically her subgaleal hemorrhage
23 extends from the right side to the top of the head and to
24 the left side.

25 My concern here was how does additional brown small --

1 I can call it satellite type of subgaleal hemorrhages. We
2 can see, and this is more on the top of the head. Here is
3 more like front of the head.

4 So my decision was I was trying to count, but it was
5 really hard to count the contusions. I know in the Court
6 it will be very important, so I decided to wait and come
7 back and retake some pictures so I can count those
8 contusions.

9 Why it's important, because in forensic pathology, we
10 have to tell defense, prosecution, whatever, about the
11 points of impact. Every point of impact, points of impact
12 is a result of a blunt force injury. That's one of the
13 initial photos I took in the first day.

14 Q. Picture Exhibit 9E, you said you took pictures both on
15 the 12th and again on the 13th. Was this picture taken on
16 the first day or the second day?

17 A. That's the first, I believe.

18 Q. Did you also take pictures of the same area on the
19 following day, on the 13th?

20 A. I took numerous pictures on the second day, as well.

21 Q. Dr. Froloff, what's on the monitor now is Exhibit 9F.
22 Does this picture show the same area as we saw in
23 Exhibit 9E?

24 A. If you flipped over like 180 degrees, it looks almost
25 the same. I put my tag at the bottom again right here.

1 I'm trying to take second set of pictures. You can see,
2 again, extensive subgaleal hemorrhage right here, mostly in
3 the frontal area, but this was in front of the head, but
4 you start to see that small subgaleal hemorrhage.

5 I tried to count all subgaleal hemorrhages on the top
6 of the head. I was able to see subgaleal hemorrhage on the
7 top of the head, right and left side of the head, and on
8 the side. So I was trying to count those subgaleal
9 hemorrhages. My opinion was 18 subgaleal hemorrhages.

10 Q. Now, I don't know if you can see all eight that you
11 just described for the jury in Exhibit 9F. What I'm going
12 to do is hand you the actual photograph right now. What I
13 want you to do is I'm going to give you a pen, and I'm
14 going to ask you to circle the subgaleal hemorrhages you
15 can see in Exhibit 9F. Hopefully that will mark on the
16 actual exhibit. If it doesn't work, let me know, and I'll
17 give you a different pen. It worked earlier.

18 A. It will work. Just call them subgaleal hemorrhages.
19 I can circle some of them.

20 Q. I'll give you a little different pen, because that one
21 isn't marking very good. I'll give you a little heavier
22 duty pen, if you would mark those for us.

23 A. I'll try to mark some of them. So basically all dark
24 maroon or red stuff, that's the subgaleal hemorrhages.

25 Q. So did you mark some of the subgaleal hemorrhages that

1 you can see in Exhibit 9F?

2 A. Yes.

3 Q. Now I have the picture on the monitor so the jury can
4 see better the ones you marked. You marked some rather
5 larger areas in what you described as the front of the
6 skull. Is that correct?

7 A. Yes. I am trying to mark most of the hemorrhages, but
8 there are so many of them.

9 Q. My question for you is more in relationship to the
10 four smaller ones you see in the areas I'm depicting on the
11 top. Describe their appearances for the jury.

12 A. Pardon me, I'm sorry?

13 Q. Describe the appearance of the four smaller subgaleal
14 injuries to the jury that you circled on the top of the
15 head.

16 A. I just circled four small subgaleal hemorrhages, which
17 again I describe in the final autopsy protocol was more
18 than that. I think there were eight on the top. They look
19 fairly small. Some of them look almost in a linear type of
20 fashion. I have to get up. Right here. It looks like
21 small subgaleal hemorrhage. Right here, right here, right
22 here. I didn't mark it right here, but a subgaleal
23 hemorrhage right here and right here. (Witness
24 indicating.)

25 Q. When you looked at the patterns of those injuries, did

1 you have an opinion within a reasonable degree of medical
2 certainty what those looked like to you?

3 A. It looks to me like subgaleal hemorrhages.

4 Q. What I'm asking, do you have an opinion within a
5 reasonable degree of medical certainty what looked like the
6 instrumentality or what caused those marks?

7 A. Okay.

8 MR. KHOROOSI: Your Honor, I object. It calls
9 for the ultimate question.

10 THE COURT: Overruled.

11 BY MR. MILLER:

12 Q. You may answer.

13 A. Thank you. Very common question in forensic
14 pathology. Mechanism of injury, injury induced by object,
15 fist, or leg by kicking and so on. That's what we're
16 trying to differentiate.

17 In my opinion, looking for clusters of the subgaleal
18 hemorrhage, I feel it's my opinion used by fist. Of course
19 it can be induced by fists on the knuckles, or of course
20 being used by some other objects.

21 But the point is, I'm highly suspicious it could be
22 used by a fist, but could be used by just punching. That's
23 my best opinion.

24 Q. I will now move to Exhibit 9G, Dr. Froloff. What do
25 we see in this picture?

1 A. Exhibit 9G. This is one of the initial photos I
2 obtained. That's the first day before like I shaved
3 completely her hair. You can see some black hair right
4 here. This is again from the top of the head and goes to
5 the back of the head, exposes her back of her head. This
6 is, again, one of the initial photos when I come back, the
7 subgaleal hemorrhage coming from right, left, side, and top
8 of the head.

9 I'm trying to -- I'm trying to correspond injury in
10 the back of her head. Remember, the small faint contusions
11 to subgaleal hemorrhage. That's the reason I took this
12 picture.

13 Q. So this is a picture of the back of her head?

14 A. Well, that's skin which I peeled, second portion of
15 the skin I peeled to the back. This is part of the
16 contusion from the top, and this is probably from the back
17 of the head.

18 Q. Please point out for the jury the subgaleal contusions
19 you see in this photograph.

20 A. Again, it's all dark red or whatever, dark maroon
21 part. That's all subgaleal hemorrhage. This picture is
22 taken the first day. You can also see smaller contusions,
23 small subgaleal hemorrhage right here.

24 Q. Again, you kind of circled and then pointed. How many
25 of the smaller ones do you see?

1 A. Here I can see two.

2 Q. Again, would you just -- without using a circle, just
3 point to the two.

4 A. Right here and right there. (Witness indicating.)

5 Q. Moving on to a different area, this is what is marked
6 as Government's Exhibit 9J. What does this picture show?

7 A. Exhibit 9J, that's after the first autopsy when I
8 exposed the subgaleal tissue. I start an examination of
9 the brain. In order to examine brain, to start with the
10 brain, what we have to do is we have to, again, using a
11 saw, cut the top of the head, it's called the wall of the
12 head, cut from the front, go to the back, and then come
13 back, kind of a circle type of motion. So I had to cut her
14 skull and take this wall of the skull out.

15 So when I took her skull out, you expose basically a
16 subdural space. In the lower portion you can see part of
17 the brain. That's part of the brain. The brain is very
18 soft, almost like Jello-type consistency.

19 Then in the middle of the picture you can see it's
20 called a subdural hemorrhage. So all red spots here, all
21 red spots here, it's a subdural hemorrhage. Here slightly
22 peeled on the top, that's called dura mater. Dura mater is
23 really kind of firm, connective tissue, firmly attached to
24 the inside, to the skull. Potential space, that's not
25 really space. That's because potential space is called

1 epidural space.

2 When we perform autopsy, we kind of strip from the
3 skull to expose epidural space. Why it's important is
4 because we need to document trauma. I know in this case
5 it's subdural hemorrhage. I didn't recover a lot of blood
6 from her head, less than one cc, cubic centimeters.
7 Basically it's one-fifth of a teaspoon of blood, so it's a
8 small amount.

9 The significance of this photo. In forensic
10 pathology, we know it's going to be questioned about dating
11 of the injuries. So in my opinion this subdural hemorrhage
12 looked acute, which according to our specifications, is 72
13 hours, basically three days. Three to two, three weeks
14 it's subacute. It's a chronic subdural hematoma. I
15 describe in the final autopsy protocol basically it's a
16 blood clot without formation of any secondary membrane.
17 There is no evidence of healing.

18 I submit part of the -- it's called dura mater, and I
19 look under the microscope, and there's no evidence of
20 healing. So I know it's an acute subdural hemorrhage. I
21 was not able to see any skull fractures. There is no skull
22 fractures in this case.

23 So at this point I decided that I need to do and
24 perform additional study of the brain, because the brain is
25 really fragile, as I mentioned to you. It's Jello-type

1 consistency. In pathology we take the brain and put it in
2 formula. We have to wait a certain period of time,
3 sometimes weeks, month, when brain becomes firmer so I can
4 make better slices.

5 In this case I decided our New York pathologist would
6 be helpful, and we can examine brain with her. So I took
7 this brain out and submitted it for fixation. Again, you
8 can see here subdural hemorrhage, and finding subdural
9 hemorrhages, a hemorrhage in a two-year-old, it's always
10 worse.

11 Q. You mentioned that you had a neuropathology exam done.
12 I want to talk to you about that in a bit. I want to go
13 back and break up your answer, because it was a pretty long
14 one.

15 You said what we see in this picture is a subdural
16 hemorrhage. Explain in lay person's terms what a subdural
17 hemorrhage is.

18 A. I have to start with basic anatomy. I'll try to be
19 short.

20 Our head, we have inside of our head we have a brain.
21 Brain is very soft tissue. I'm not going to go into
22 detailed anatomy of the brain, but the brain is composed of
23 a gray matter, which is made from numerous cells, and white
24 matter. White matter is a projection of the neurons. It
25 could be a couple of feet long. It's the white matter.

1 The brain is covered by it's called arachnoid, because
2 it looks like web. It's Greek, arachnoid. It's really
3 fine vascular type of membrane covering the brain.

4 Then people have a subdural space. Subdural space
5 where cerebral spinal fluid circulates. Subdural space
6 connected to the brain by small, tiny veins, goes reaching
7 in, acting like a bridge connecting from the skull to the
8 brain. Bridging these could be important.

9 Then potential space between dura mater and skull is
10 epidural space. Usually we don't have epidural space
11 unless someone has a skull fracture. People have a skull
12 fracture, dura tries to peel, and we have potential
13 subdural space. We have a skull, and then we have some
14 yellow tissue, whatever, skin and hair. That's the basic
15 anatomy. So this is subdural hematoma.

16 Q. When you say subdural, is that the area between the
17 brain and the skull?

18 A. Right. Well, between dura and brain, yes.

19 Q. We're not going to point to the picture for a bit, so
20 if you want to sit down, that's fine.

21 You also talked about what the subdural hemorrhage
22 shows in relationship to aging or dating the injury. What
23 I would like you to explain is what do you look at when
24 looking at a subdural hemorrhage in order to date or age
25 the injury?

1 A. Again, first impression like gross, meaning looking by
2 eyes, very important. We have to deal with subdural
3 hematoma almost on a weekly basis, because people develop a
4 subdural hematoma and they can die. So I'm looking for
5 appearance of subdural hematoma.

6 In this case in my opinion it's acute, because it
7 looks like basically clotted blood. It's not firmly
8 touched or adhered to dura mater. I mentioned to you when
9 hematoma starts to heal, a lot of the cells -- same like in
10 bruises. Maybe it's different grades, but cells come in
11 and try to heal the subdural hematoma. Subdural hematomas
12 heal in different manners than bruises in the skin.

13 So when people have subacute hematoma, you can see
14 formation of the fiber in this type of membrane. When the
15 hematoma starts to heal, it starts then to disappear, and
16 sometimes you can see like when the hematoma is resolved,
17 you can see coloration of the subdural space when it's
18 completely disappeared.

19 So with subdural hematoma, we have better luck to date
20 the injuries.

21 Q. You indicated the injury that caused the subdural
22 hematoma that we see in this exhibit was acute? Did I use
23 the right word?

24 A. Yes. I classified acute subdural hematoma.

25 Q. When you use the word "acute" in terms of dating or

1 aging an injury, how long are we talking about in days?

2 A. General classification, it's up to 72 hours.

3 Q. Three days. The next picture I want to show is

4 Exhibit 9K. What do we see here?

5 A. Exhibit 9K. So continuing an examination of the
6 skull, because I saw some evidence of trauma in the brain.

7 What you can see here, it's the base of the skull, so it's
8 a picture of the bottom of the head from the inside.

9 That's kind of like facial hair on the top of the head.

10 That's the back of the head. Again, I examined this body
11 -- examined the base of the skull for fractures, because
12 kids' skull is fairly thinner, whereas the adults are more
13 pliable.

14 In this picture you can see my identification number.
15 In the top portion you can see some triangular-shape
16 defects. What happened in this case, I knew that this kid
17 had bilateral retinal hemorrhage, hemorrhage in the back of
18 the eye. I knew that from medical records, so I suspect
19 additional injury to the eyes, which is common. It's
20 nonspecific, but we can see fairly often.

21 So what happened, I basically used the same saw, made
22 triangle-shaped cuts, and here you can see on the left and
23 right side it looks like a different color, whitish on the
24 left, reddish on the right back here. That's the top
25 portion of the eyes. So I took a portion of the eye, and

1 you can see metal or rod, which we insert under the optic
2 nerve. This part, purplish part here on the right and left
3 side, that's the optic nerve. It doesn't look like a
4 normal optic nerve. Optic nerve, it's a projection of the
5 brain. It's not really nerve. It's projection of the
6 brain.

7 In a normal condition it's, I would say, light brown
8 color probably. When you see optic nerve like that color,
9 that's a hemorrhage. So I was able to confirm that this
10 is, indeed, hemorrhage. I took both eyes out, and I looked
11 at both eyes under microscope. I make some sections.
12 That's a hemorrhage here.

13 Q. When you say these optic nerve hemorrhages were
14 nonspecific, what do you mean by the word "nonspecific"?

15 A. Most of the time in our office we have to deal with
16 numerous cases of child abuse. You can see these cases in
17 child abuse where they are punched in the head. Sometimes
18 less often you can see those changes, but I see like rare
19 cerebral edema cases. Once again, it's a very unusual
20 finding. It's a worse finding with the hemorrhage of the
21 optic nerves. This is suspicious again.

22 Q. Do you have an opinion, within a reasonable degree of
23 medical certainty, what would have caused this optic nerve
24 hemorrhage that we see in Exhibit 9, I think this is K? I
25 better double-check that. Yes, 9K.

1 A. I do.

2 Q. Go ahead. What is your opinion, Doctor?

3 A. In my opinion in this case, because present is a
4 number of contusions of the head, subgaleal hemorrhages in
5 multiple planes, plus retinal hemorrhage to the back of the
6 eyes, it's highly suspicious for -- it's an impact type of
7 injury.

8 Q. I have one more for you, Doctor. This is Exhibit 9L.
9 The first question I have, was this picture taken the first
10 day or the second day?

11 A. This picture was taken the second day.

12 Q. What does this picture show?

13 A. Again, I'm trying to count all contusions, which is
14 hard in this case. This is the frontal area. That's a
15 frontal area of the head. You can see that right here at
16 the bottom. It looks like a triangle-shape cut here. The
17 triangle-shape cut is in the middle of the forehead. We do
18 triangular-shape cut so we can put the skull back and it's
19 kind of stable, not moving. That's why it's
20 triangular-shaped cut.

21 I decided to examine frontal area and take additional
22 pictures. Again, you can see numerous small areas of
23 almost round contusions. I can just show you. Right here,
24 here, here, and here.

25 Q. I want to make sure. The area of the body we're

1 looking at is the frontal area of Aleeyah's head?

2 A. Yes. It's the frontal area and pictures taken
3 slightly from the right side.

4 Q. How many contusions do we see in this photograph?

5 A. Again, I can't tell you. I have to stick to my
6 protocol. I can see numerous contusions. Can I go back
7 and refresh my memory? I can tell you exact numbers.

8 Q. Yes, you can, if that will refresh your memory.

9 THE COURT: You may.

10 A. In the final autopsy protocol I describe -- it's a lot
11 of injuries. It's hard to remember. I describe exactly 18
12 injuries. There was 7 almost round subgaleal hemorrhages
13 on the right frontal area ranging in size from, I put 0.5
14 to 1 centimeter in diameter, and two hemorrhages on the
15 left frontal area. The size was 3-by-2 centimeters, which
16 3 centimeters is a little bit larger than one inch, and two
17 centimeters smaller. In the mid forehead was subgaleal
18 hemorrhages, and then the top of the head was a subgaleal
19 hemorrhage.

20 BY MR. MILLER:

21 Q. So when we look at Exhibits 9L, 9G, 9F, and 9E, how
22 many total subgaleal hemorrhages did you count?

23 A. I describe in the final autopsy protocol a total of
24 18. Some of the two pictures represent first day of the
25 examination, so basically you can see it looks like a giant

1 big subgaleal hemorrhage.

2 Q. In medical terms is the head divided into various
3 sizes, different parts of the head?

4 A. Sure. You can use some planes.

5 Q. Okay. How many different planes or areas of the head
6 does a person have?

7 A. Usually in anatomy we describe three planes. Like I'm
8 not going to use medical terminology. It's complicated.
9 It's vertical plane. Then plane horizontal, and then
10 sagittal plane. Basically it's like four planes. You can
11 use four planes.

12 Q. These subgaleal hemorrhages that you saw, on how many
13 different planes did you observe them of her head?

14 A. I don't like to use planes.

15 Q. What's your word?

16 A. I can say I observed subgaleal hemorrhage in the front
17 of the head. I observed subgaleal hemorrhage on the top of
18 the head. I observed subgaleal hemorrhage on the right and
19 left side of the head, and in the back.

20 Q. On the 18 subgaleal hemorrhages that you observed on
21 Aleeyah's head, is that number of subgaleal hemorrhages
22 consistent with a single fall from a chair of approximately
23 two feet in height?

24 A. Considering all her contusions in the head, which is
25 located again in a different plane, so a different part of

1 the head, subgaleal hemorrhages and other injuries, which
2 we didn't talk here before, I don't think so, that it's
3 consistent with a single fall.

4 Q. Now, we also talked about the different areas of the
5 head; front, back, sides. Is finding subgaleal hemorrhages
6 on all these four different areas of the head consistent
7 with a single fall?

8 A. I don't think so.

9 Q. Tell us why you don't think these various findings are
10 consistent with a single fall.

11 A. Because with all my training and experience, in fact,
12 I'm not sure -- I was on call last week, and the gentleman
13 who fell had injuries. Single fall documented. He had a
14 fairly large hemorrhage on the top of the head. That's it.
15 It just doesn't make any sense.

16 Q. You indicated when we looked at the picture, one of
17 the pictures, you indicated there was no skull fracture.
18 Based on your experience and training, would you expect to
19 see a skull fracture from a fall?

20 A. Sometimes people have a skull fracture from a fall.
21 Sometimes they don't have skull fractures.

22 Q. Beyond the various subgaleal hemorrhages, the subdural
23 hematoma, the optic nerve hemorrhages we talked about, did
24 you make any other pertinent observations during the course
25 of your internal examination?

1 A. Yes.

2 Q. Please describe those for us.

3 A. Well, if you are including neurological evaluation.

4 Q. I'll get to that. We're talking about just what you
5 saw.

6 A. Basically her injury was concentrated in the head. I
7 didn't see any other injuries to her body. We completely
8 X-rayed her body. I didn't see any other old healed-in
9 type of fractures on her body.

10 In this case I had to cut her skin all most in the
11 legs and arms and her back. I did not see any injury in
12 her body. Everything was concentrated to her head.

13 Q. You indicated more than once during your testimony
14 that once you completed your portion of the autopsy, you
15 had a neuropathological exam done. Is that correct?

16 A. Yes. I considered it's my portion of the autopsy. I
17 just needed help with the neuropathologist.

18 THE COURT: I think we'll deal with the
19 neuropathological exam tomorrow morning. So you can step
20 down now, Doctor, until tomorrow morning.

21 (Witness excused)

22 THE COURT: Well, now, remember what I told you
23 about no cell phone research, no talking with regard to
24 Facebook friends or anybody else about the fact you are in
25 a murder trial. You can tell your significant other that

1 you got selected for the jury and will be here the rest of
2 the week. But beyond that, you can't talk to anybody about
3 it, because the next thing they'll want to know is they'll
4 say, "What is it about?" If you tell them, they might
5 think they know something about the case or they have views
6 about cases, in general. I don't want you to give any of
7 that extraneous information. It may be well-intentioned on
8 their part, but that's not the point.

9 The point is that you'll decide this case based upon
10 the evidence you hear from the witness stand, the exhibits
11 that are received, and then applying whatever you find to
12 be the facts from that to the law as I give it to you.

13 I don't want any extraneous information. That means
14 no research of any kind and no communicating with other
15 people, including each other, about this case.

16 Keep an open mind about the case. The Government is
17 putting their case in now, and they have the burden. But
18 there's more evidence to be heard. So don't make up your
19 mind about anything yet. Keep an open mind. Think about
20 other things tonight. Not this. You can leave your notes
21 here, and nobody is going to read them. They will be here
22 for you in the morning.

23 I want the jury to come back at 9:00 in the morning
24 and proceed ahead with the case. Thank you. Please stand
25 for the jury. Counsel stay.

(The jury left the courtroom)

THE COURT: There was going to be some 404(b).

How long will it take to present that?

MR. WRIGHT: There's two witnesses to that. I would anticipate that would be 30 minutes for the same motion, same issue.

THE COURT: I think the court reporter would rather do it now or tomorrow morning.

THE REPORTER: Tomorrow.

THE COURT: Be here at 8:30 tomorrow morning to present the 404 (b) evidence.

MR. WRIGHT: Yes, Sir.

THE COURT: Anything else? Thank you. We are in recess.

(End of proceedings for the day at 5:21 p.m.)

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